TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 808.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE NEW SOUTH FARM & HOME COMPANY, CHARLES H. SEIG, BEN LEVIN, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

FILED JANUARY 10, 1916.

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INDEX.

1 In the District Court of the United States in and for the Southern District of Florida, at the special June term of said court held in and for said district at Jacksonville, Florida, on the eighth day of June, A. D. 1914.

The grand jurors of the United States of America within and for the Southern District of Florida, good and lawful men duly and legally selected, chosen, drawn, and summonsed from the body of the said district and duly and legally empanelled, examined, sworn, and charged to inquire of and concerning crimes and offenses committed in said district, on their oaths present:

That Charles H. Seig, Ben Levin, Benjamin F. Strauss, Fred W. Turner, and Charles Greve, hereinafter referred to as defendants, before and at the several times of the committing of the several offenses hereinafter mentioned in this indictment, were directors and stockholders in the New South Farm & Home Company, a corporation then and there engaged in selling approximately one hundred and forty-two thousand (142,000) acres of land referred to in the literature hereinafter mentioned as the Burbank-Ocala Colony and the Florida-Palatka Colony, situated in Putnam, Marion, and Clay Counties, Florida, and represented to be owned by the said New South Farm & Home Company; that said defendants before and at the several times of the committing of the several offenses hereinafter mentioned in this indictment had devised a scheme and artifice to defraud George W. Bond, Remember Thornton, J. F. Redman, George S. Bowen, Mrs. Nora Poppe, L. M. Anderson, J. H. Shepley, Louis Zeigler, Frank Zeigler, Marvin Outcault, J. D. McCannon, O. Blume, J. O. Osborne, I. A. Kimpton, W. W. Pringle, Nels. Johnson, Jos. P. Chaves, Edgar L. Smith, I. H. Meadors, J. W. Atkins, Jos. Erard, jr., Jos. Erard, sr., H. J. Green,

1½ Mrs. Emma Buck, N. O. Bennett, George W. Bennett, and divers other persons to the grand jurors unknown and the public generally, hereinafter in this indictment referred to as persons intended to be defrauded, which said scheme and artifice to defraud was to be effected by said defendants opening correspondence and communication with the said persons so intended to be defrauded and inciting said persons so intended to be defrauded to open correspondence and communication with the said New South Farm & Home Company, and the said defendants by means of the post-office establishment of the United States and by means of verbal and oral communications, that is to say, a certain scheme and artifice to defraud the said persons so intended to be defrauded of their money and property, intending to convert the same to the use and gain of the said defendants and the said New South Farm & Home Company, respectively, the actual amounts of which are to the grand jurors unknown, in and by inducing through fraudulent artifice and devices and by false and fraudulent representations and pretenses said persons so intended to be defrauded to part with their money and property, that is to say:

By offering for sale and selling to such persons so intended to be defrauded certain lots, plats, tracts, and parcels of land called ten acre farms, hereinafter in this indictment called farms, by first requiring each one of the persons so intended to be defrauded to sign an application in substance and to the effect to purchase one of said farms at the prices and upon the terms set out in said applications, and by inducing and attempting to induce said persons so intended to be defrauded, by means of certain false and fradulent representations of and concerning the title, fertility, value, drainage, location, and survey of said farms and the improvements made and to be made upon the same, to purchase said farms and thereby part
2 with their said money and property, and which said false and fraudulent representations of and concerning said land and farms, the title, fertility, value, drainage, improvement, location, and survey of said farms and the advantages to be enjoyed by the purchasers thereof, were a part of said scheme and artifice to defraud and were in substance and to the effect:

That said lands and farms were not swampy;

That the largest ocean steamers operating between New York and Jacksonville could load at Palatka, Florida;

That a family could make enough on one of said farms the first year to support a family and save money besides;

That three (3) crops a year could be grown on said farms;

That every month in the year was a growing month, meaning by the phrase "growing month" that you could raise some farm or truck product on said farms during each month of the year;

That said farms were surrounded by bearing orange and citrus fruit groves and vegetable truck farms;

That said farms had fine roads running through them; that said farms were high and dry and well drained and on the whole like the lands of Kansas, Nebraska, Iowa, and Illinois;

That artesian wells were scattered about on said lands and farms and that they could be obtained by going down 100 feet;

That said land was divided into one hundred and sixty (160) acre tracts;

That roads were being built around each 160 acre tract and that each of said ten acre farms would face on a road;

That ditches were being dug so that each of said farms would be drained;

That said farms were sold with a positive guarantee that every purchaser, either by himself or his agent, might inspect the
3 farm purchased by him at any time before the actual delivery of his deed and that if upon such inspection the lands were not what the purchaser desired it to be he would upon demand receive back every cent he had paid upon the purchase price of said farm together with six per cent (6%) interest;

That many miles of fences had been erected and hundreds of homes and many schoolhouses built on said lands; that said schoolhouses were more than comfortable filled with pupils and that more

schools would have to be built to take care of the rapid growth of the colonists settling upon said farms;

That comfortable hotels had been built upon said lands and farms;

That improvements of all kinds were going forward at a wonderful rate;

That lumber was so cheap that one could build a beautiful home upon said farms without nearly so great an expense as in most sections of Florida, and for about one-half of the expense the same building would cost in the North;

That the Title Guarantee Company of Jacksonville, Florida, would guarantee and insure the title to said farms;

That said defendants and the said New South Farm & Home Company had made arrangements with the Guarantee Title Company of Jacksonville, Florida, at great expense, to guarantee the title to said farms so that the purchasers of said farms might know that their investments were absolutely safe;

That said farms were cut over and ready to go upon at once, and that there were no timber leases on said lands and farms;

That said defendants were not land brokers or speculators; that when they offered a tract of land for sale said New South Farm & Home Company owned it outright.

That the title to said farms were examined and approved
4 by the best attorneys obtainable; that anybody buying a farm from said company could depend upon securing a clear title because the New South Farm & Home Company was selling something that it owned itself;

That said farms were free from mosquitos, malaria, and insects of all kinds, and that said farms were below frost line;

That the said New South Farm & Home Company had completed arrangements by which a telephone line would be extended direct to Palatka, with local exchanges at Burbank, Fort McCoy, Orange Springs, and Kenilworth, and that these connections would place each and every of said farms in direct touch with the community at all times;

That said lands and farms were located high and dry and in a section well drained;

That hundreds of people had already settled upon said farms;

That at the little city of Burbank said lands and farms had increased within one year double, treble, and quadruple the price paid for them by settlers and purchasers, and that the same was true of the lands owned by said New South Farm & Home Company at Silver City;

That thousands of settlers were on said lands and farms, and that those who had purchased said lands and farms could sell the same at a very large profit;

That the said lands and farms which the New South Farm and Home Company were selling at thirty ($30) dollars an acre would within two years be worth $200.00 and $300.00 per acre;

That on said lands and farms were located well-stocked stores and factories;

That said farms were the best located and most fertile lands in America;

That Luther Burbank had arranged with and sold to the New South Farm & Home Company the exclusive right for the production of certain of his farm products;

5 That the New South Farm & Home Company would install a great Burbank producing station on said lands and farms, and that Frederick W. Malley, the greatest agriculturist in America, would be the director of said station, and that from said station would be sent the great products of Burbank to all the world;

That the purchasers of said lands and farms would share in the profits of said station and that the said Frederick W. Malley would be available for the needs of all the purchasers of said farms;

That you could get out of a Pullman car on the said farms, use a local long-distance telephone, have the daily paper, rural free delivery, and all the comforts of the home;

That the Burbank farm products grown upon said farms would produce hundreds of dollars worth of profit per acre;

That the purchasers of said farms would receive deeds and plants grown at said Burbank station;

That said farms, when allotted to purchasers, would be free from all timber reservations;

That one of said ten-acre farms would support any family in luxury and enable it to lay by a comfortable sum each year;

That one of said ten-acre farms would make a purchaser thereof independent.

That the title to said farms was perfect;

That there was no spot on the North American Continent where nature and man had joined together so successfully for the luxurious abode of humanity as it had upon said lands;

That it was not necessary to fertilize said farms, because the soil was the best in the world;

That there was ample rainfall every month in the year upon said farms, which rendered irrigation of said farms unnecessary.

That there was a National Forest Reserve lying east of 6 the Burbank-Ocala colony, which compelled all of the thousands that were seeking lands in and around Marion County to settle on the Burbank-Ocala tract;

That the New South Farm & Home Company was building roads, schools, and homes for the settlers;

That said farms were the center of countless thriving homes;

That a farm home in Florida, with but a few hours' work every day, would permit any man or woman to prevent the catastrophe of destitute old age;

That the native inhabitants in and around said farms were staring with wide-open eyes at the things that the Yankees were doing on said farms;

That there was a great deal of opposition on the part of the native inhabitants of said section, for the reason that the vast tracts of lands being offered for sale by said New South Farm & Home Company was being fenced, and the natural range for the cattle of the native inhabitants being destroyed; that the natives were thereby being forced to roll up his shirt sleeves and go to work;

That the native inhabitants had made themselves ludicrous by endeavoring to discourage peoples from settling upon said farms;

That the pictures in the publications sent out by said defendants represented the true conditions to be seen on said farms.

And each of the aforesaid representations, as said defendants well knew, were and would be false and fraudulent, and the said defendants intended thereby to deceive said persons so intended to be defrauded to induce such persons to part with their money and
7 property in the purchase of said farms as aforesaid, whereas in truth and in fact large portions of said lands and farms were wet and swampy;

That the largest ocean steamships operating between New York and Jacksonville could not load at Palatka;

That a family could not make enough on one of said farms the first year to support a family and save money besides;

That three crops a year could not be grown on said farms; that some farm or truck produce could not be grown upon said farms every month in the year;

That said farms were not surrounded by bearing orange and citrus-fruit groves and vegetable truck farms:

That said farms did not have fine roads running through them;

That said farms were not well drained and on the whole like the lands of Kansas, Nebraska, Iowa, and Illinois;

That artesian wells were not scattered about on said farms;

That each of said farms did not face on a road; that ditches were not dug for the drainage of said farms;

That many miles of fences had not been erected on and around said farms and hundreds of homes and many school houses had not been built on said farms; that what school houses there were were not more than comfortably filled with pupils, and the rapid increase of population had not made it necessary to build more schools;

That many comfortable hotels had not been built on said lands and farms, and that improvements of all kinds were not going forward at a wonderful rate;

That every purchaser of said farms would not be refunded upon demand every dollar paid in, together with six per cent interest, at any time before the actual delivery of a deed if a purchaser
8 found upon inspection either by himself or his agent the land or farm purchased was not what he desired it to be;

That lumber was not so cheap that one could build a beautiful home on said farms without nearly as great an expense as in other sections of Florida, and at half the expense the same building would cost in the North;

That the New South Farm & Home Company had not at great expense made arrangements with The Title Guarantee Company of Jacksonville to guarantee and insure the title to said farms so that purchasers thereof might know that their investments were absolutely safe;

That said farms had not been cut over and were not ready to go upon at once;

That said farms were not free and clear of timber leases;

That said defendants were land brokers and speculators and did not own said farms out-right;

That said New South Farm & Home Company was not selling the said persons intended to be defrauded something that it owned itself;

That said lands and farms were not free from mosquitoes and malaria and insects of all kinds and were and are not below the frost line:

That the New South Farm & Home Company had not completed arrangements by which a telephone line would be extended direct to Palatka with local exchanges at Burbank, Ft. McCoy, Bay Lake, Orange Springs, and Kenilworth for the purpose of placing each and every of said farms in direct touch with the community at all times;

That all of said farms were not located high and dry and in a section well drained;

9 That hundreds of people had not settled upon said farms;

That said lands and farms at the little city of Burbank and Silver City had not within one year doubled, trebled, and quadrupled the purchase price paid therefor by settlers and purchasers;

That thousands of settlers were not on said lands and farms;

That those who had purchased said lands and farms could not sell the same at a large profit;

That the lands and farms which the New South Farm & Home Company were selling at $30.00 an acre would not be worth $200.00 and $300.00 an acre within two (2) years;

That there were not well-stocked stores and factories on said lands and farms;

That said lands and farms are not the most fertile in America;

That Luther Burbank had not arranged with and sold to the New South Farm & Home Company the exclusive right to produce certain of his farm products;

That the New South Farm & Home Company would not install a great Burbank producing station on said farms and that Frederick W. Malley would not be placed as director of said station;

That the great products of Burbank would not be sent from said station to all the world;

That the purchasers of said farms would not share in the profits of said station;

That the said Frederick W. Malley would not be available for the needs of the purchasers of said farms;

That you could not get out of a Pullman car on the said farms, use a local or long distance telephone, have rural free delivery, and all the comforts of a home;

10 That hundreds of dollars worth of profit per acre could not be realized from the Burbank farm products grown upon said farms;

That the purchasers of said farms would not receive seeds and plants grown at a Burbank station;

That said farms when allotted to settlers and purchasers would not be free from all timber reservations;

That one of these ten acre farms would not support any family in luxury and enable it to lay up a comfortable sum each year;

That one of said ten acre farms would not make one independent;

That the title to said farms was not perfect;

That nature and man had not joined together more successfully upon said lands and farms for the luxurious abode of humanity than it had on any other spot on the North American Continent;

That it was necessary to fertilize said lands and farms in order to grow anything on them;

That the soil on said farms was and is not the best in the world;

That there was and is not enough rain fall every month in the year upon said farms to make irrigation unnecessary;

That there was no national forest reserve lying east of said Burbank-Ocala tract of land which compelled all who were seeking lands in and around Marion County to settle on the said Burbank-Ocala Colony;

That the New South Farm & Home Company were not building roads, schools, and homes for the settlers;

That said farms were not the centre of countless thriving homes;

11 That none of said farms would, as a result of a few hours' work each day, enable or permit any man or woman to prevent the catastrophe of destitute old age;

That the native inhabitants in and around the said Burbank-Ocala Colony were not staring with wide-open eyes at the things the Yankees were doing;

That there was not a great deal of opposition on the part of the native inhabitants because said lands and farms were being fenced and their natural cattle range destroyed;

That the native inhabitants of said section had not been forced to roll up their shirt sleeves and go to work because of anything done or accomplished by the New South Farm & Home Company, or said defendants;

That the native inhabitants of said section had not made themselves ludicrous and had not endeavored to discourage purchasers from settling upon said farms because of any antipathy to said purchasers;

That the pictures in said publications did not represent the true conditions to be seen on said farms.

All of which the defendants then and there well knew.

And the aforesaid fraudulent artifices and devices, false and fraudulent representations and pretenses were to be made and communicated and caused to be made and communicated as aforesaid by the said defendants to the said persons so intended to be defrauded through and by means of certain oral statements, circulars, letters, maps, advertisements, writings, packets, photographs, pictures, papers, and publications, so worded, drawn, constructed, presented, and expressed as to deceive, and they were then and there inte'ded to deceive any person who might receive them; that said documents, publications, letters, packets, papers, writing, and
12 advertisements are all too voluminous to be set forth in this indictment, wherefore the grand jurors omit the same.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said Chas. H. Seig, Ben Levin, Benjamin F. Straus, Fred W. Turner, and Chas. Greve, so having devised and intended to devise the aforesaid artifice and scheme to defraud as aforesaid, in and for executing the same and attempting so to do, did, unlawfully, wilfully, knowingly, and feloniously on the 20th day of June, A. D. 1911, and thence continually until the day of the finding of this indictment, at the cities of Jacksonville and Palatka, in the State of Florida, and within the jurisdiction of this court, place and cause to be placed in the post office of the United States station thereof, letter box, and authorized depositary for mail matter in said cities of Jacksonville and Palatka, in the southern district of Florida aforesaid, certain publications known as "The New Florida" and "Ten Acres and Freedom," and certain other letters, prints, pamphlets, magazines, and publications containing the false representations hereinbefore set forth; said documents, publications, and letters being too lengthy and voluminous to be set forth in this indictment, wherefore the grand jurors omit the same, which said publications, letters, circulars, writings, and advertisements were addressed to the said persons intended to be defrauded and on which the legal United States postage had been paid, contrary to the form of the statute in such case, made and provided and against the peace and dignity of the United States of America.

13 SECOND COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, further present:

That Chas. H. Seig, Ben Levin, Benjamin F. Straus, Fred W. Turner, and Charles Greve, hereinafter referred to as defendants, before and at the several times of the committing of the several offenses hereinafter mentioned in this indictment were directors and stockholders in the New South Farm & Home Company, a corporation then and there engaged in selling approximately one hundred forty-two thousand (142,000) acres of land referred to in the literature hereinafter mentioned as the Burbank-Ocala Colony, and

the Florida-Palatka Colony, situated in Putnam, Marion, and Clay Counties, Florida, and represented to be owned by the New South Farm & Home Company;

That on the 20th day of June, A. D. 1911, and thence continually until the date of the finding of this indictment and within the jurisdiction of this court, the said defendants, and divers other persons to the grand jurors unknown, did then and there unlawfully, wilfully, knowingly, and feloniously conspire, combine, confederate, and agree together, and with divers other persons to the grand jurors unknown, to commit the acts made offenses and crimes by the laws of the United States to prevent the use of the United States mails to promote frauds, that is to say:

The said defendants did then and there unlawfully, wilfully, knowingly, and feloniously conspire, combine, confederate, and agree together to devise and intending to devise a scheme and artifice to defraud George W. Bond, Remember Thornton, J. F. Redman, George S. Bowen, Mrs. Nora Poppe, L. M. Anderson, J. H. Shepley,
Louis Zeigler, Frank Zeigler, Marvin Outcault, J. D. Mc-
14 Cannon, O. Blume, J. O. Osborne, I. A. Kimpton, W. W.
Pringle, Nels Johnson, Jos. P. Chaves, Edgar L. Smith, I. H. Meadors, J. W. Atkins, Jos. Erard, jr., Joseph Erard, sr., H. J. Green, Mrs. Emma Buck, N. O. Bennett, George W. Bennett, and divers other persons to the grand jurors unknown, and the public generally, hereinafter in this indictment all called persons intended to be defrauded, and which said scheme and artifice to defraud was to be effected by the said defendants opening correspondence and communication with the said persons so intended to be defrauded and inciting said persons so intended to be defrauded to open correspondence and communication with the said New South Farm & Home Company, and the said defendants and their agents, by means of the post office establishment of the United States, and by means of verbal and oral communications, that is to say: A certain scheme and artifice to defraud the said persons so intended to be defrauded of their money and property intending to convert the same to the use and gain of the said defendants and the said New South Farm & Home Company, respectively, the actual amounts of which are to the grand jurors unknown, in and by inducing through fraudulent artifices and devices and by false and fraudulent representations and pretenses, said persons so intended to be defrauded to part with their money and property, that is to say: By offering for sale and selling to said persons so intended to be defrauded certain lots, plats, tracts, and parcels of lands called ten acre farms, hereinafter in this indictment called "farms," by first requiring each one of the persons so intended to be defrauded to sign an application in substance and to the effect to purchase one of said farms at the
price and upon the terms set out in said application, and by
15 inducing and attempting to induce the said persons so intended to be defrauded by means of certain false and fraudulent representations of and concerning the title, fertility, value,

drainage, location, and survey of said farms and improvements made and to be made upon the same, to purchase said farms, and thereby part with their said money and property, and which said false and fraudulent representations were then and there a part of said scheme and artifice which the said defendants and said divers other persons to the grand jurors unknown, so conspired, and devised to execute, and were further in substance and to the effect that:

That said lands and farms were not swampy;

That the largest ocean steamers operating between New York and Jacksonville could not land at Palatka, Florida;

That a family could make enough on one of said farms the first year to support a family and save money besides;

That three (3) crops a year could be grown on said farms;

That every month in the year was a growing month, meaning by the phrase "growing month" that you could raise some farm or truck product on said farms during each month of the year;

That said farms were surrounded by bearing orange and citrus fruit groves and vegetable truck farms;

That said farms had fine roads running through them;

That said farms were high and dry and well drained; and on the whole like the lands of Kansas, Nebraska, Iowa, and Illinois;

That artesian wells were scattered about on said lands and farms and that they could be obtained by going down 100 feet;

That said land was divided into one hundred sixty (160) acre tracts;

That roads were being built around each 160 acre tract, and that each of said ten acre farms would face on a road;

That ditches were being dug so that each of said farms would be drained;

That said farms were sold with a positive guarantee that every purchaser, either by himself or his agent, might inspect the farm purchased by him at any time before the actual delivery of his deed and that if, upon such inspection the lands were not what the purchaser desired it to be, he would, upon demand, receive back every cent he had paid upon the purchase price of said farm, together with six per cent (6%) interest;

That many miles of fences had been erected and hundred of homes and many school houses built on said lands;

That said school houses were more than comfortably filled with pupils and that more schools would have to be built to take care of the rapid growth of the colonists settling upon said farms;

That comfortable hotels had been built upon said lands and farms;

That improvements of all kinds were going forward at a wonderful rate;

That lumber was so cheap that one could build a beautiful home upon said farms without nearly so great an expense as in most sections of Florida, and for about half of the expense the same building would cost in the North;

That the Title Guarantee Company of Jacksonville, Florida, would guarantee and insure the title to said farms;

That said defendants and the said New South Farm & Home Company had made arrangements with the Guarantee Title Company of Jacksonville, Florida, at great expense, to guarantee
17 the title to said farms, so that the purchasers of said farms might know that their investments were absolutely safe;

That said farms were cut over and ready to go upon at once, and that there were no timber leases on said lands and farms;

That said defendants were not land brokers or speculators; that when they offered a tract of land for sale said New South Farm & Home Company owned it out right;

That the title to said farms were examined and approved by the best attorneys obtainable; that anybody buying a farm from said company could depend upon securing a clear title because the New South Farm & Home Company was selling something that it owned itself;

That said farms were free from mosquitoes, malaria, and insects of all kinds, and that said farms were below frost line;

That the said New South Farm & Home Company had completed arrangements by which a telephone line would be extended direct to Palatka, with local exchanges at Burbank, Ft. McCoy, Bay Lake, Orange Springs, and Kenilworth, and that these connections would place each and every of said farms in direct touch with the community at all times;

That said lands and farms were located high and dry and in a section well drained;

That hundreds of people had already settled upon said farms;

That at the little city of Burbank said lands and farms had increased within one year double, treble, and quadruple the price paid for them by settlers and purchasers and that the same was true of the lands owned by said New South Farm & Home Company at Silver City;

18 That thousands of settlers were on said lands and farms and that those who purchased said lands and farms could sell the same at a very large profit;

That the said lands and farms which the New South Farm & Home Company were selling at thirty ($30.00) dollars an acre, would within two years be worth $200.00 and $300.00 per acre;

That on said lands and farms were located well-stocked stores and factories;

That said farms were the best located and most fertile lands in America;

That Luther Burbank had arranged with and sold to the New South Farm & Home Company the exclusive right for the production of certain of his farm products;

That the New South Farm & Home Company would install a great Burbank producing station on said lands and farms, and that Frederick W. Malley, the greatest agriculturist in America, would be the

director of said station, and that from said station would be sent the great products of Burbank to all the world;

That the purchasers of said lands and farms would share in the profits of said station, and that the said Frederick W. Malley would be available for the needs of all the purchasers of said farms;

That you could get out of a Pullman car on the said farms, use a local long distance telephone, have the daily paper, rural free delivery, and all the comforts of the home;

That the Burbank farm products grown upon said farms would produce hundreds of dollars worth of profit per acre;

19 That the purchasers of said farms would receive seeds and plants grown at said Burbank Station;

That said farms when alloted to purchasers, would be free from all timber reservations;

That one of said ten acre farms would support any family in luxury and enable it to lay by a comfortable sum each year;

That one of said ten acre farms would make a purchaser thereof independent;

That the title to said farms was perfect;

That there was no spot on the North American Continent where nature and man had joined together so successfully for the luxurious abode of humanity as it had upon said lands;

That it was not necessary to fertilize said farms because the soil was the best in the world;

That there was ample rain fall every month in the year upon said farms which rendered irrigation of said farms unnecessary;

That there was a national forest reserve lying east of the Burbank-Ocala Colony, which compelled all of the thousands that were seeking lands in and around Marion County to settle on the Burbank-Ocala tract;

That the New South Farm & Home Company was building roads, schools, and homes for the settlers;

That said farms were the centre of countless thriving homes;

That a farm in Florida with but a few hours work every day would permit any man or woman to prevent the catastrophe of destitute old age;

That the native inhabitants in and around said farms were staring with wide open eyes at the things that the Yankees were doing on said farms;

20 That there was a great deal of opposition on the part of the native inhabitants of said section for the reason that the vast tracts of lands being offered for sale by the said New South Farm & Home Company was being fenced and the natural range for the cattle of the native inhabitants being destroyed; that the natives were thereby being forced to roll up his shirt sleeves and go to work;

That the native inhabitants had made themselves ludicrous by endeavoring to discourage people from settling upon said farms;

That the pictures in the publications set out by said defendants represented the true conditions to be seen on said farms;

And each of the aforesaid representations, as said defendants well knew, were and would be false and fraudulent and the said defendants intended thereby to deceive said persons so intended to be defrauded to induce said persons to part with their money and property in the purchase of said farms as aforesaid, whereas in truth and in fact large portions of said lands and farms were wet and swampy;

That the largest ocean steamers operating between New York and Jacksonville could not load at Palatka;

That a family could not make enough on one of said farms the first year to support a family and save money besides;

That three crops a year could not be grown on said farms; that some farm or truck product could not be grown upon said farms every month in the year;

That said farms were not surrounded by bearing orange and citrus fruit groves and vegetable truck farms;

That said farms did not have fine roads running through them;

21 That said farms were not well drained, and on the whole like the lands of Kansas, Nebraska, Iowa, and Illinois;

That artesian wells were not scattered about on said farms;

That each of said farms did not face on a road;

That ditches were not dug for the drainage of said farms;

That many miles of fences had not been erected on and around said farms, and hundreds of homes and many schoolhouses had not been built on said farms; that what schoolhouses there were were not more than comfortably filled with pupils, and the rapid increase of population had not made it necessary to build more schools;

That many comfortable hotels had not been built on said lands and farms, and that improvements of all kinds were not going forward at a wonderful rate;

That every purchaser of said farms would not be refunded upon demand every dollar paid in, together with six per cent interest, at any time before the actual delivery of a deed, if a purchaser found upon investigation either by himself or his agent the land or farm purchased was not what he desired it to be;

That lumber was not so cheap that one could build a beautiful home on said farms without nearly as great an expense as in other sections of Florida, and at half the expense the same building would cost in the North;

That the New South Farm & Home Company had not at great expense made arrangements with The Title Guarantee Company of Jacksonville to guarantee and insure the title to said farms so that purchasers thereof might know that their investments were absolutely safe;

22 That said farms had not been cut over and were not ready to go upon at once; that said farms were not free and clear of timber leases;

That said defendants were land brokers and speculators and did not own said farms out-right;

That said New South Farm & Home Company was not selling the said persons intended to be defrauded something that it owned itself;

That said lands and farms were not free from mosquitoes and malaria and insects of all kinds, and were and are not below the frost line;

That the New South Farm & Home Company had not completed arrangements by which a telephone line would be extended direct to Palatka with local exchanges at Burbank, Ft. McCoy, Bay Lake, Orange Springs, and Kenilworth for the purpose of placing each and every of said farms in direct touch with the community at all times;

That all of said farms were not located high and dry and in a section well drained;

That hundreds of people had not settled upon said farms;

That said lands and farms at the little City of Burbank and Silver City had not within one year doubled, trebled, and quadrupled the purchase price paid therefor by settlers and purchasers;

That thousands of settlers were not on said lands and farms;

That those who had purchased said lands and farms could not sell the same at a large profit;

That the lands and farms which the New South Farm & Home Company were selling at $30.00 an acre would not be worth $200.00 and $300.00 an acre within two years;

23 That there were not well-stocked stores and factories on said lands and farms;

That said lands and farms are not the most fertile in America;

That Luther Burbank had not arranged with and sold to the New South Farm & Home Company the exclusive right to produce certain of his farm products;

That the New South Farm & Home Company would not install a great Burbank producing station on said farms, and that Frederick W. Malley would not be placed as director of said station;

That the great products of Burbank would not be sent from said station to all the world;

That the purchasers of said farms would not share in the profits of said station;

That the said Frederick W. Malley would not be available for the needs of the purchasers of said farms;

That you could not get out of a Pullman car on the said farms, use a local long-distance telephone, have rural free delivery, and all the comforts of a home;

That hundreds of dollars worth of profit per acre could not be realized from the Burbank farm products grown upon said farms;

That the purchasers of said farms would not receive seeds and plants grown at a Burbank station;

That the said farms when allotted to settlers and purchasers would not be free from all timber reservations;

That one of these ten-acre farms would not support any family in luxury and enable it to lay up a comfortable sum each year;

That one of said ten-acre farms would not make one independent;

24 That the title to the said farms was not perfect;

That nature and man had not joined together more successfully upon said lands and farms for the luxurious abode of humanity than it had on any other spot on the North American Continent;

That it was necessary to fertilize said lands and farms in order to grow anything on them;

That the soil on said farms was and is not the best in the world;

That there was and is not enough rainfall every month in the year upon said farms to make irrigation unnecessary;

That there was no national forest reserve lying east of said Burbank-Ocala tract of land which compelled all who were seeking lands in and around Marion County to settle on the said Burbank-Ocala Colony;

That the New South Farm & Home Company were not building roads, schools, and homes for the settlers;

That the said farms were not the centre of countless thriving homes;

That none of said farms would as a result of a few hours of work each day, enable or permit any man or woman to prevent the catastrophe of destitute old age;

That the native inhabitants in and around the said Burbank-Ocala Colony were not staring with wide-open eyes at the things the Yankees were doing;

That there was not a great deal of opposition on part of the native inhabitants because said lands and farms were being fenced and their natural cattle range destroyed;

That the native inhabitants of said section had not been forced to roll up their shirt sleeves and go to work because of anything done or accomplished by the New South Farm & Home Company or said defendants;

25 That the native inhabitants of said section had not made themselves ludicrous and had not endeavored to discourage purchasers from settling upon said farms because of any antipathy to said purchasers;

That the pictures in said publications did not represent the true conditions to be seen on said farms.

All of which the defendants then and there well knew.

And the aforesaid fraudulent artifices and devices, false and fraudulent representations and pretenses were to be made and communicated and caused to be made and communicated as aforesaid, by the said denfendants unlawfully conspiring as aforesaid, to the said persons so intended to be defrauded, through and by means of certain oral statements, circulars, letters, maps, advertisements, wr[illegible]

ings, packets, papers, photographs, and publications so worded, drawn, and constructed, expressed and presented as to deceive any person who might receive them; that said documents, letters, and publications are too voluminous to be set forth in this indictment, wherefore the grand jurors omit the same.

And it was a part of said conspiracy of said defendants to execute said scheme and artifice to defraud and attempting so to do by placing and causing to be placed in the post office of the United States, to wit, the post office at Palatka, in the State of Florida, and post office at Jacksonville, in the State of Florida, and divers other post offices of the United States to the grand jurors unknown, said circulars, letters, maps, advertisements, writings, packets, papers, pictures, and publications, to be sent and delivered by the said post office establishment of the United States.

26 And the grand jurors aforesaid, upon their oaths aforesaid, further present and say that the said unlawful conspiracy was to be effected and carried out in the same manner and by the means herein described and that said conspiracy was entered into by said defendants on or about the thirtieth day of April, A. D. 1910, at the city of Jacksonville, in the State of Florida, and within said Southern District of Florida, and from the said thirtieth day of April, A. D. 1910, up to and until the first day of June, A. D. 1914, said conspiracy was continuously and at all times during and between said dates next preceding the first day of June, A. D. 1914, and continuously in existence and in process of execution and operation, and that said conspirators had then and there knowingly, falsely, wickedly, corruptedly, unlawfully, and feloniously conspired, combined, confederated, and agreed together and with divers other persons to the grand jurors unknown as aforesaid.

1st. And the grand jurors aforesaid do further present that, in pursuance of said unlawful conspiracy, combination, confederation, and agreement, as aforesaid, and to effect the object thereof, the said Chas. H. Seig, afterwards, to wit, on the 11th day of October, A. D. 1911, at Jacksonville, Florida, did then and there unlawfully and knowingly place and cause to be placed in the post office of the United States, station thereof, letter-box, and authorized depository for mail matter, a certain letter, which was then and there inclosed in an envelope addressed and directed to Mr. Frank Zeigler, Alamosa, Colorado, and which said letter is in substance as follows:

27 (Telephone Central 5807.)

NEW SOUTH FARM & HOME COMPANY,
MERCHANTS LOAN & TRUST BUILDING, CHICAGO,
Jacksonville, Fla., October 11, 1911.

Cont. #4849.

Mr. FRANK ZEIGLER,
Alamosa, Colo.

DEAR MR. ZEIGLER: We enclose acknowledgment of contract, together with savings bank receipt book, showing that you have been

allotted in section 28, township 11, range 23, block 4, tract 4, acres 10, and credited with your first payment on same. You will also find inclosed map showing location of your farm.

We are glad to tell you that in the allotting of your contract we have endeavored to give you a very choice location, and feel that it will please you beyond the question of a doubt; it is likewise our pleasure to say to you that the latest reports coming from our Florida offices show the greatest development and the highest progress it has been our experience to record at so early a stage in the development of our last four colonies in Florida.

Our settlers are arriving daily and occupying their farms. The land is being rapidly cleared, crops are being planted, houses erected, stores built, and, on a whole, it is impossible for us to set forth in a letter to you exactly how stupendous is the work that is going on there. Without a question of a doubt the Florida Palatka Colony is enjoying the greatest prosperity.

The men who compose this company have, during the past year, successfully settled three other Florida colonies.

Land in these colonies can not be purchased to-day at anywhere near the figure the original purchasers obtained same, and while the other three colonies were regarded by all the purchasers and, for that matter expert land men, as being eminently successful, we know that the Florida Palatka Colony is developing faster and is being more rapidly settled than either of the three colonies.

Florida-Palatka Colony lies in perhaps the most ideal location in the entire State of Florida. It occupies the crest of a watershed that is acknowledged to be the highest land in the State; it is free from any unhealthful condition; it is swept alternately by the breezes from the Gulf of Mexico and the Atlantic Ocean. On the eastern and southern borders it is bounded by the beautiful Ocklawaha River, up and down which run freight and passenger steamboats, which stop at various landings along this colony.

27½ Transportation facilities, so important to the farmer in getting his produce to the market, are the very best. The Atlantic Coast Line Railroad extends through the center of the colony running east and west and the Ocala Northern Railway, which will be finished within a few months, runs through the southwestern part of the colony northeasterly direction. The northern part of the colony is taken care of by the Georgia Southern and Florida Railway. You will see from the map that we are exceptionally well provided with railroads and transportation. We predict that within six months from this day land values in Florida-Palatka Colony will have reached the point equal to that of those bearing grove lands and vegetable truck farms which surround it upon all sides.

Make up your mind to come to Florida-Palatka Colony just as soon as you can, and join the hundreds who are to-day making this spot the one and only garden region of this delightful and beautiful locality.

This company desires to assure you that it will assist you as far as it can in any manner that pertains to the erection and improvement of your home, and we want you to feel that in seeking the advice of this company upon any question in connection with your future home in this colony you may do so without reluctance.

We are always glad to be at your service and will consider it our duty and pleasure to have you call upon us in the future for such favors as you think we can show you.

Yours, very truly,

NEW SOUTH FARM & HOME COMPANY.
CHAS. H. SEIG,
President.

28 2nd. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that in pursuance of said unlawful conspiracy, combination, confederation, and agreement as aforesaid, and to effect the object thereof the said Chas. H. Seig afterwards, to wit, on the 15th day of June, A. D. 1912, at Palatka, Florida, in the district aforesaid, did then and there unlawfully and knowingly place, and cause to be placed, in the post office of the United States, station thereof, letter box, and authorized depository for mail matter, a certain letter which was then and there inclosed in an envelope, addressed and directed to Mr. W. W. Pringle, Conemaugh, Pa., and which said letter is in substance as follows:

NEW SOUTH FARM & HOME COMPANY,
Palatka, Florida, June 15, 1912.

MR. W. W. PRINGLE,
Canneaugh, Pa.

DEAR SIR: I believe in talking right out in meeting. Most of the misunderstandings in this world would never occur if folks would only tell one another exactly what they think and mean.

I realized that this company is effected somewhat by the reckless talk stirred up by the Everglades agitation, just because we are in Florida and the Everglades are also in Florida, although we are hundreds of miles from the Everglades and are in nowise concerned in Everglades problems or Everglades questions. It's just like when a badly managed bank in your community gets into trouble. Immediately all the timid people get suspicious of all the banks without distinguishing between the strong ones and the weak ones, or between the well managed and the poorly managed ones.

29 Every once in a while we get a letter that seems to express some feeling of doubt as to whether Florida lands title in general are all they ought to be. The purpose of this letter is to kill that doubt as to the titles of this company with a hard boiled statement of facts.

This company does not convey bad titles. It could not afford to do so. Nothing on earth would ruin its business so quickly as that. The company's contract has always provided that you will get a

full warranty deed when your purchase is completed. Now, to make you doubly sure that your warranty deed will convey you perfectly good title in your land the company is ready to go still further.

It gives me great pleasure to announce that we are now prepared to have the titles of our buyers guaranteed by a sound and responsible guaranty company. We are prepared to have your title insured as titles of big real estate holdings in the large cities are insured, or as you have your house and furniture insured against loss by fire.

Owing to the fact that the title guaranty company can only issue its policies covering specified descriptions it will be necessary for such of our purchasers as desire to avail themselves of this offer to accept the land allotted to them. For this purpose the company will now issue an absolute bond or contract for deed containing an agreement on its part to convey your land to you by warranty deed, free from encumbrances, upon the payment of the amount specified in the contract; also, to furnish you at the same time and at the company's expense, the aforesaid title guaranty certificate or insurance policy. The signing of this contract makes the sale absolute and unconditional. This bond or contract provides further for the benefit of any purchaser who has not yet personally inspected his land that if for any reason he prefers another location when he comes to make personal inspection of his land, he will have the privilege of exchanging his allotment any time before delivery of deed for any other available tract of equal area and price.

In other respects this bond or contract is the same in effect as the old "acknowledgement of contract," only expressed in simpler terms, and imposes no new obligations upon you.

To save time in closing up all these details, I am inclosing you the above-mentioned bond, executed in duplicate, which guarantees to you the privileges I have enumerated, including the insurance policy. Please sign one of the copies on the blank line at the bottom and send it back to us with your old contract. If for any reason the proposition does not appeal to you I shall be glad to learn your objections at your earliest convenience.

Yours, very truly,

NEW SOUTH FARM & HOME COMPANY,
CHAS. H. SEIG, *President*.

3rd. And the grand jurors aforesaid, upon their oaths aforesaid, further present:

That in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid and to effect the object thereof, the said Chas. H. Seig, on the 4th day of December, A. D. 1911, at Jacksonville, in the State of Florida, within the Southern District of Florida, did then and there unlawfully and knowingly place and cause to be placed in the post office of the United States, station thereof, letter box, and authorized depositary for mail matter, a certain circular letter headed "This is my personal letter to you,"

which said circular is too lengthy and voluminous to set out in this indictment, and which was then and there enclosed in an envelop addressed and directed to Mr. George W. Bennett, 11 Cottage
31 Street, Meriden, Conn., contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

THIRD COUNT.

And the grand jurors aforesaid, upon their oaths aforesaid, further present that Chas. H. Seig, Ben Levin, Benjamin F. Strauss, Fred W. Turner, and Charles Greve, hereinafter referred to as defendants, before and at the several times of the committing of the several offenses hereinafter mentioned in this indictment were directors and stock holders in the New South Farm & Home Company, a corporation then and there engaged in selling approximately one hundred and forty two thousand (142,000) acres of land referred to in the literature hereinafter mentioned as the Burbank-Ocala Colony; the Florida-Palatka Colony, and Ten Acre Farms, situated in Putnam, Marion, and Clay Counties, Florida, and represented to be owned by the New South Farm & Home Company, and that said defendants, before and at the time of the committing of the offenses hereinafter mentioned, had devised a scheme and artifice to defraud George W. Bond, Remember Thornton, J. F. Redman, George S. Bowen, Mrs. Nora Poppe, L. M. Anderson, J. H. Shepley, Louis Zeigler, Frank Zeigler, Marvin Outcault, J. D. McCannon, O. Blume, J. O. Osborne, I. A. Kimpton, W. W. Pringle, Nels Johnson, Joseph Erard, jr., Joseph Erard, sr., H. J. Green, Mrs. Emma Buck, N. O. Bennett, George W. Bennett, and divers other persons to the grand jurors unknown, to wit, the public generally hereafter in this indictment referred to as persons intended to be defrauded, by publishing and causing and procuring to be published in divers prints, papers, pamphlets, booklets, circulars, and divers advertisements in which it was represented in substance that the said lands hereinbefore referred to were not swampy;

32 That the largest ocean steamers operating between New York and Jacksonville could load at Palatka, Florida;

That a family could make enough on one of said farms the first year to support a family and save money besides;

That three (3) crops a year could be grown on said farms;

That every month in the year was a growing month, meaning by the phrase "growing month" that you could raise some farm or truck product on said farms during each month of the year;

That said farms were surrounded by bearing orange and citrus fruit groves and vegetable truck farms;

That said farms had fine roads running through them;

That said farms were high and dry and well drained and on the whole like the lands of Kansas, Nebraska, Iowa, and Illinois;

That artesian wells were scattered about on said lands and farms and that they could be obtained by going down 100 feet;

That said land was divided into one hundred and sixty (160) acre tracts;

That roads were being built around each 160-acre tract and that each of said ten-acre farms would face on a road;

That ditches were b'ing dug so that each of said farms would be drained;

That said farms were sold with the positive guarantee that every purchaser, either by himself or his agent, might inspect the farm purchased by him at any time before the actual delivery of his deed, and that if, upon such inspection, the lands were not what the purchaser desired it to be, he would, upon demand, receive back every cent he had paid upon the purchase price of said farm, together with six per cent (6%) interest;

33 That many miles of fences had been erected and hundreds of homes and many schoolhouses built on said lands; that said schoolhouses were more than comfortably filled with pupils and that more schools would have to be built to take care of the rapid growth of the colonists settling upon said farms;

That comfortable hotels had been built upon said lands and farms;

That improvements of all kinds were going forward at a wonderful rate;

That lumber was so cheap that one could build a beautiful home upon said farms without nearly so great an expense as in most sections of Florida, and for about one-half of the expense the same building would cost in the North;

That the Title Guaranty Company of Jacksonville, Florida, would guarantee and insure the title to said farms;

That said defendants and the said New South Farm & Home Company had made arrangements with the Guarantee Title Company of Jacksonville, Florida, at great expense, to guarantee the title to said farms, so that the purchasers of said farms might know that their investments were absolutely safe;

That said farms were cut over and ready to go upon at once, and that there were no timber leases on said lands and farms;

That said defendants were not land brokers or speculators; that when they offered a tract of land for sale said New South Farm & Home Company owned it out-right;

That the title to said farms were examined and approved by the best attorneys obtainable; that anybody buying a farm from said company could depend upon securing a clear title, because the New South Farm & Home Company was selling something that it owned itself;

34 That said farms were free from mosquitoes and malaria and insects of all kinds, and that said farms were below the frost line;

That the said New South Farm & Home Company had completed arrangements by which a telephone line would be extended direct to Palatka, with local exchanges at Burbank, Fort McCoy, Bay Lake, Orange Springs, and Kenilworth and that these connections would place each and every of said farms in direct touch with the community at all times;

That said lands and farms were located high and dry and in a section well drained;

That hundreds of people had already settled upon said farms;

That at the little city of Burbank, said lands and farms had increased within one year, double, treble, and quadruple the price paid for them by settlers and purchasers and that the same was true of the lands owned by said New South Farm & Home Company at Silver City;

That thousands of settlers were on said lands and farms and that those who had purchased said lands and farms could sell the same at a very large profit;

That the said lands and farms which the New South Farm & Home Company were selling at thirty ($30) dollars an acre, would within two years be worth $200.00 and $300.00 per acre;

That on said lands and farms were located well-stocked stores and factories;

That said farms were the best located and most fertile lands in America;

That Luther Burbank had arranged with and sold to the New South Farm & Home Company the exclusive right for the production of certain of his products;

35 That the New South Farm & Home Company would install a great Burbank Producing Station on said lands and farms and that Frederick W. Malley, the greatest agriculturist in America, would be the director of said station and that from said station would be sent the great products of Burbank to all the world;

That the purchasers of said lands and farms would share in the profits of said station and that the said Frederick W. Malley would be available for the needs of all the purchasers of said farms;

That you could get out of a Pullman car on the said farms, use a local long-distance telephone, have a daily paper, rural free delivery, and all the comforts of home;

That the Burbank farm products grown upon said farms would produce hundreds of dollars worth of profit per acre;

That the purchasers of said farms would receive seeds and plants grown at said Burbank Station;

That the said farms when allotted to purchasers would be free from all timber reservations;

That one of said ten acre farms would support any family in luxury and enable it to lay by a comfortable sum each year;

That one of said ten acre farms would make a purchaser thereof independent;

That the title to said farms was perfect;

That there was no spot in the North American Continent where nature and man had joined together so successfully for the luxurious abode of humanity as it had upon said lands;

That it was not necessary to fertilize said farms because the soil was the best in the world;

That there was ample rain fall every month in the year upon said farms which rendered irrigation of said farms unnecessary;

36 That there was a national forrest reserve lying east of the Burbank-Ocala colony, which compelled all of the thousands that were seeking lands in and around Marion County to settle on the Burbank-Ocala colony;

That the New South Farm & Home Company was building roads, schools, and homes for the settlers;

That said farms were the centre of countless thriving homes;

That a farm home in Florida, with but a few hours work every day, would permit any man or woman to prevent the catastrophe of destitute old age;

That the native inhabitants in and around said farms were staring with wide open eyes at the things that the Yankees were doing on said farms;

That there was a great deal of opposition on the part of the native inhabitants of said section for the reason that the vast tracts of lands being offered for sale by said New South Farm & Home Company was being fenced and the natural range for the cattle of the native inhabitants being destroyed; that the natives were thereby being forced to roll up his shirt sleeves and go to work;

That the native inhabitants had made themselves ludicrous by endeavoring to discourage people from settling upon said farms;

That the pictures in the publications sent out by said defendants represented the true conditions to be seen on said farms;

And each of the aforesaid representations, as said defendants well knew, were and would be false and fraudulent, and the said defendants intended thereby to deceive said persons so intended to be defrauded and induce said persons to part with their money and property in the purchase of said farms as aforesaid, whereas in truth and in fact large portions of said lands and farms were wet and swampy;

37 That the largest ocean steamers operating between New York and Jacksonville could not load at Palatka;

That a family could not make enough on one of said farms the first year to support a family and save money besides;

That three crops a year could not be grown on said farms; that some farm or truck product could not be grown upon said farms every month in the year;

That said farms were not surrounded by bearing orange and citrus-fruit groves and vegetable truck farms;

That said farms did not have fine roads running through them;

That said farms were not well drained and on the whole like the lands of Kansas, Nebraska, Iowa, and Illinois;

That artesian wells were not scattered about on said farms;

That each of said farms did not face on a road;

That ditches were not dug for the drainage of said farms;

That many miles of fences had not been erected on and around said farms and hundreds of homes and many school houses had not been built on said farms; that what school houses there were were not more than comfortably filled with pupils, and the rapid increase of population had not made it necessary to build more schools;

That many comfortable hotels had not been built on said lands and farms, and that improvements of all kinds were not going forward at a wonderful rate;

That every purchaser of said farms would not be refunded upon demand every dollar paid in, together with six per cent interest, at any time before the actual delivery of a deed, if a purchaser found upon inspection, either by himself or his agent, the land or farm purchased was not what he desired it to be;

38

That lumber was not so cheap that one could build a beautiful home on said farms without nearly as great an expense as in other sections of Florida, and at half the expense the same building would cost in the North;

That the New South Farm & Home Company had not at great expense made arrangements with the Title Guarantee Company of Jacksonville to guarantee and insure the title to said farms so that purchasers thereof might know that their investments were absolutely safe;

That said farms had not been cut over and were not ready to go upon at once;

That said farms were not free and clear of timber leases;

That said defendants were land brokers and speculators and did not own said farms outright;

That said New South Farm & Home Company was not selling the said persons intended to be defrauded something that it owned itself;

That said lands and farms were not free from mosquitoes and malaria and insects of all kinds and were and are not below the frost line;

That the New South Farm & Home Company had not completed arrangements by which a telephone line would be extended direct to Palatka, with local exchanges at Burbank, Fort McCoy, Bay Lake, Orange Springs, and Kenilworth for the purpose of placing each and every of said farms in direct touch with the community at all times;

That all of said farms were not located high and dry and in a section well drained;

39

That hundreds of people had not settled upon said farms;

That said lands and farms at the little city of Burbank and Silver City had not within one year doubled, trebled, and quadrupled the purchase price paid therefor by settlers and purchasers;

That thousands of settlers were not on said lands and farms;

That those who had purchased said lands and farms could not sell the same at a large profit;

That the lands and farms which the New South Farm & Home Company were selling at $30.00 an acre would not be worth $200.00 and $300.00 an acre within two (2) years;

That there were not well-stocked stores and factories on said lands and farms;

That said lands and farms are not the most fertile in America;

That Luther Burbank had not arranged with and sold to the New South Farm & Home Company the exclusive right to produce certain of his farm products;

That the New South Farm & Home Company would not install a great Burbank producing station on said farms, and that Frederick W. Malley would not be placed as director of said station;

That the great products of Burbank would not be sent from said station to all the world;

That the purchasers of said farms would not share in the profit of said station;

40 That the said Frederick W. Malley would not be available for the needs of the purchasers of said farms;

That you could not get out of a Pullman car on the said farms, use a local long-distance telephone, and have rural free delievery, and all the comforts of home.

That hundreds of dollars' worth of profit per acre could not be realized from the Burbank farm products grown upon said farms;

That the purchasers of said farms would not receive seeds and plants grown at a Burbank station;

That the said farms when allotted to settlers and purchasers would not be free from all timber reservations;

That one of these ten-acre farms would not support any family in luxury and enable it to lay up a comfortable sum each year;

That one of said ten-acre farms would not make one independent;

That the title to said lands and farms was not perfect;

That nature and man had not joined together more successfully upon said lands and farms for the luxurious abode of humanity than it had on any other part of the North American Continent;

That it was necessary to fertilize said lands and farms in order to grow anything on them;

That the soil on said farms was and is not the best in the world;

That there was and is not enough rainfall every month in the year upon said farms to make irrigation unnecessary;

That there was no National Forest Reserve lying east of said Burbank-Ocala tract of land which compelled all who were seeking lands in and around Marion County to settle on said Burbank-Ocala Colony;

41 That the New South Farm & Home Company were not building roads, schools, and homes for the settlers;

That said farms were not the centre of countless thriving homes;

That none of said farms would, as a result of a few hours' work each day, enable or permit any man or woman to prevent the catastrophe of destitute old age;

That the native inhabitants in and around the said Burbank-Ocala Colony were not staring with wide open eyes at the things the Yankees were doing;

That there was not a great deal of opposition on the part of the native inhabitants because said lands and farms were being fenced and their natural cattle range destroyed;

That the native inhabitants had not been forced to roll up their shirt sleeves and go to work because of anything done or accomplished by the New South Farm & Home Company or said defendants;

That the native inhabitants of said section had not made themselves ludicrous and had not endeavored to discourage purchasers from settling upon said farms because of any antipathy to said purchasers;

That the pictures in said publications did not represent the true conditions to be seen on said farms;

All of which the defendants then and there well knew.

That they, the said defendants, did then and there purpose and intend by said advertisements and representations so made as aforesaid, to induce the said persons so intended to be defrauded to pay divers sums of money to them, the said defendants, under the name of the New South Farm & Home Company, for divers ten-acre tracts of said lands, and did then and there purpose and intend to
42 defraud the persons hereinbefore named as persons intended to be defrauded of such sums of money as should be paid by them to said defendants under the name of the New South Farm & Home Company.

And the said Chas. H. Seig, Ben Levin, Benjamin F. Staus, Fred W. Turner, and Charles Greve, so having devised the said scheme and artifice to defraud in and for executing the same and attempting so to do, on or about the 22nd day of April, A. D. 1912, at Palatka, Florida, within the Southern District of Florida, unlawfully and feloniously did place and cause to be placed in the post office of the said United States there, a certain letter to be sent and delivered by the post-office establishment of the United States, on which the legal United States postage had been paid, that is to say, a letter addressed to Mrs. Emma Buck, Mt. Healthy, Ohio, which said letter is in words and figures as follows; to wit:

General offices now located on main floor Duval Building, Jacksonville, Florida, cor. Hogan and Forsyth Streets.

NEW SOUTH FARM & HOME COMPANY,
Palatka, Fla., April 10, 1912.

MRS. EMMA BUCK,
Mount Healthy, Ohio.

DEAR MADAM: It gives me great pleasure to be able to say to you that the New South Farm & Home Company has finally decided

upon a step (if its customers agree) that will put this company still more emphatically in a class by itself for fair dealing and liberality to buyers, and that will give you as a buyer in the Ocala-Palatka colonies, the benefit of the very best method yet devised to make land investments absolutely safe.

43 This company is prepared to insure your title. It is prepared to give you a regular title insurance policy, and give it to you absolutely free—without one cent of expense to you. In doing this the company will be putting your purchase on a level with real estate investments in the big cities, where purchasers of property running into millions always take the precaution of having their titles protected by a title insurance policy.

The company has made arrangements for this with the Title Guaranty Company of Jacksonville, Florida—the largest title insurance company in this part of the country. That company is incorporated under and governed by the laws of Florida, and does a land title insurance business like the title insurance companies of New York, Chicago, St. Louis, and other large cities. Under our arrangement with company when the New South Farm & Home Company issues to you its warranty deed to the land you have purchased, the Title Guaranty Company will also issue to you an individual insurance policy, insuring your title to the land, as set forth in the warranty deed. We pay the insurance premium. Thus insured, investments in these colonies will be doubly protected; they will be protected by the warranty deed of the New South Farm & Home Company, which is backed by all the resources of this company, and they will be protected by the guarantee of the Title Guaranty Company, of Jacksonville, Florida.

The company's original intention was to reserve this title-insurance privilege for those buyers of the future who will buy on a straight real estate basis; that is, paying a quarter or a third down on the purchase price, and giving notes for the balance, payable in one, two, and three years, with interest. These terms will be much more profitable to us, you know, than the terms on which we

44 sold to you, so profitable that we can easily afford to pay for a title insurance policy for such purchasers. In fact we expect to put all sales of the company on such a straight real estate basis in the near future.

But the company has finally decided, at my solicitation, to extend this title insurance privilege to the older buyers who have, by their prompt payments, contributed to the success of the colonies. The company has decided to do so; that is, if the buyers themselves will cooperate with us promptly and in sufficient numbers to make this step feasible.

It is going to cost the company a lot of money to have these titles insurance policies issued to all our old buyers like yourself. The cost will be prohibitive unless we can be assured of such a number of them that the Title Guaranty Company will make us a low, flat

rate for the premium, therefore we must know very soon approximately how many of our buyers want to take advantage of this very liberal proposition.

Owing to the fact that the Title Guaranty Company can only issue its policies covering specific descriptions it will be necessary for such of our purchasers as desire to avail themselves of this offer to accept the land allotted to them. For this purpose the company will now issue an absolute bond or contract for deed containing an agreement on its part to convey the title to the land purchased by warranty deed, free from incumbrances, upon the payment of the amount specified in the contract and will, at the time of issuance of such deed, furnish to the purchaser a title insurance policy. The signing of this contract makes the sale absolute and unconditional.

This bond or contract provides further, for the benefit of any purchaser who has not yet personally inspected this land, that if for any reason he prefers another location when he comes to make a personal inspection of his land he will have the privilege of exchanging his allotment any time before delivery of deed for any other available tract of equal area and price.

To save time in closing up all these details I am enclosing you the above-mentioned bond, executed in duplicate, which guarantees to you the privilege I have enumerated, including the insurance policy. Please sign one of the copies on the blank line at the bottom and send it back to us with your old contract. If for any reason the proposition does not appeal to you I shall be glad to learn your objection at your earliest convenience.

Yours, very truly,

NEW SOUTH FARM & HOME COMPANY,
CHAS. H. SEIG, *President.*

Contrary to the form of the form of the statute in such case made and provided and against the piece and dignity of the United States of America.

HEBERT S. PHILLIPS,
United States Attorney.

(Endorsed:) In the United States District Court, in and for the Southern District of Florida, special June term thereof, held at Jacksonville, Florida, June 8th, 1914. United States of America vs. New South Farm & Home Company, Chas. H. Seig, Ben Levin, Benjamin F. Straus, Fred W. Turner, and Chas. Greve. Indictment: Violation section 215, Penal Code. A true bill. Jno. W. Hollister, foreman. Filed June 13, 1914. E. D. Dodge, clerk. Recorded in book 2, page 407.

46 United States of America in the District Court of the United States for the Southern District of Florida.

UNITED STATES OF AMERICA
vs.
CHARLES H. SEIG ET AL.

Demurrer.

And the said Charles H. Seig, in his own proper person, comes into court here and having heard the said indictment and each and every count thereof read, says that the said indictment and each and every count therein and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law, that he, the said Charles H. Seig, is not bound by the law of the land to answer the same, and this he is ready to verify:

Wherefore, for want of a sufficient indictment in this behalf he, the said Charles H. Seig, prays judgment and that by the court he may be dismissed and discharged from said indictment and each and every count thereof, and that he may go hence without delay.

And said Charles H. Seig, assigns the following causes for demurrer to said indictment and to the several counts thereof as follows, to wit:

I.

That said indictment does not nor does any count thereof inform the defendants of the nature and cause of their accusations with the particularity required by law.

47

II.

That said indictment does not nor does any count thereof aver and charge any offense against the United States.

III.

Each and every count thereof is insufficient in that said counts do not nor do any or either of them aver the facts constituting a scheme to defraud.

IV.

Each and every count in the indictment is insufficient for repugnancy, uncertainty, ambiguity, and evasiveness.

V.

Each and every count in the indictment is insufficient for want of distinct and adequate specifications of the particulars wherein the

several representations called in said counts false representations were false.

VI.

The said first count of said indictment is insufficient and void and should be quashed and held for naught because said count is duplicitous in that it charges defendants with a multiplicity of separate offenses extending over a period of three years and charges the defendants with separate offenses at Jacksonville and Palatka in the State of Florida.

VII.

The second count of said indictment is insufficient to charge any offense against the United States in the following particulars among others:

Said second count sets forth a supposed conspiracy to do two things, (a) to devise a scheme to defraud and (b) to execute said scheme to defraud by placing and causing to be placed in the post offices of the United States certain letters, etc., to be sent and delivered by the post office establishment of the United States,
48 but fails to set forth any overt act of any person connected with said supposed conspiracy done in pursuance of the objects of said conspiracy in this:

It is averred that the said Charles H. Seig, at a time and place named, did place in the post office of the United States a certain letter in an envelope addressed and directed to Mr. Frank Zeigler, which letter is not averred to have been deposited to be sent and delivered by the post office establishment of the United States and which letter is not averred to be a letter in and for executing the supposed scheme to defraud in said second count alleged.

And which said letter so addressed to Mr. Frank Zeigler appears to have no relation to said supposed scheme to defraud and said second count contains no averment by which it is made to appear either that said letter was in pursuance of said supposed scheme to defraud in said second count alleged.

It is also averred in said second count that said Charles H. Seig, at a time and place mentioned, did place in the post office of the United States a certain letter directed to Mr. W. W. Pringle, but it is nowhere averred that said letter was so deposited to be sent and delivered by the post office establishment of the United States, and it is nowhere averred that said last-mentioned letter was deposited in the post office in and for executing the supposed scheme to defraud in said count alleged or in attempting so to do.

It is also averred in said second count that the said Charles H. Seig, at a time and place in said second count mentioned, did place in a post office of the United States a certain circular letter headed: "This is my personal letter to you," enclosed in an envelope directed to Mr. George W. Bennett.

49 It nowhere appears in said second count how or in what manner said circular letter was in pursuance of said supposed conspiracy or how and in what manner it would tend to effect the object thereof, and it is nowhere averred that said circular letter was placed in a post office of the United States to be sent and delivered by the post office establishment of the United States, and it is nowhere averred that said circular letter was so deposited in and for executing the supposed scheme to defraud.

VIII.

Said second count charges as a substantive offense an alleged conspiracy entered into on the 30th day of April, 1910, and on its face said count shows that the alleged offense was entered into by defendants more than three years before the indictment was found.

VIII.

Said third count of said indictment is insufficient to charge any offense against the United States for the following, among other reasons:

Because the said letter in said third count mentioned addressed to Mrs. Emma Buck shows itself on its face to be a letter written to Mrs. Buck, not for the purpose of executing the alleged scheme and artifice, but for another and different purpose, to wit, for the purpose of offering to Mrs. Emma Buck a specific benefit without cost to her and which letter appears upon its face to be written to Mrs. Buck as a personal communication after and not before the said Mrs. Buck had purchased a farm from the New South Farm & Home Company, and entirely disconnected and in no manner relating to the supposed scheme to defraud in said third count alleged.

50 IX.

Each of said counts of said indictment is insufficient to charge an offense because it is averred that the object of said supposed scheme to defraud was to induce persons to purchase farms which the New South Farm & Home Company had for sale, and it is nowhere averred in any count of said indictment that the said New South Farm & Home Company would not sell and deliver farms to such persons as should desire to purchase of the kind and quality represented, nor is it alleged that said farms so sold would not be of the full value of the price paid for them, nor is it anywhere averred in any count of said indictment that defendants intended by the said representations in each of said counts averred to defraud the said persons in said indictment mentioned, nor does it appear from any averment in said indictment mentioned that any person who should be induced to purchase a farm would be in any manner defrauded or injured.

X.

The said supposed scheme to defraud in each count of said indictment mentioned consists of certain representations in each count averred to have been intended to have been made by the defendants and certain other facts and circumstances contained in a whereas clause of each of said counts, but all of said representations and all of said facts and circumstances averred to be the constituent elements of said scheme and artifice are representations, facts, and circumstances that are consistent with the hypothesis of defendants' innocence and therefore, when all taken together, did not amount to a charge of guilt.

XI.

Each of the several counts numbered 1, 2, and 3 of said indictment are insufficient to charge the defendants with having devised a scheme and artifice to defraud in this:

51 (1) The theory of each count is apparently that said defendants formulated a plan to sell certain ten-acre farms by making certain representations which are erroneously in said indictment termed false representations, but which representations are not by any sufficient averment charged to be false and are therefore presumed to be true representations, i. e.:

(2) The representation in each count of said indictment contained, "That said lands and farms were not swampy," is not negatived so as to make said representation a false and fraudulent representation by the further averment in each of said counts contained, "Whereas in truth and in fact large portions of said lands and farms were wet and swampy," said latter averment being consistent with the hypothesis that although portions of said land were wet and swampy the remaining portions which were not swampy were the portions of said land which defendants were offering for sale and that they were not offering for sale the said wet and swampy portions, and that the offering for sale of said portions which were not wet and swampy, and so describing the same, was consistent with good faith and not false or fraudulent.

(3) The supposed representation "That the largest ocean steamers operating between New York and Jacksonville could load at Palatka, Florida," is not shown to be false and fraudulent by the further averment "That the largest ocean steamers operating between New York and Jacksonville could not load at Palatka," because said representation and negation is consistent with the fact that very large ocean steamers operating between New York and Jacksonville could load at Palatka, and because said representation was substantially true so far as it could in any way affect the sale of the farms in question.

(4) The representation "That a family could make enough on one of said farms the first year to support a family and save money besides" is not shown to be false or fraudulent by the further

averment "That a family could not make enough on one
52 of said farms the first year to support a family and save money besides," because taking such representation and negation together it is consistent with the hypothesis that one family could make enough money on one of said farms the first year to support a family and save money besides while another and different family could not do so.

(5) The representation "That three (3) crops a year could be grown on said farms" is not made to appear false or fraudulent by the further averment "That three crops a year could not be grown on said farms; that some farm or truck product could not be grown upon said farms every month in the year," because said representation and negation thereof is consistent with the hypothesis that three crops of some character could not be grown each year upon said farms, and that three crops of some other and different character could not be so grown.

(6) The representation "That every month in the year was a growing month, meaning by the phrase "growing month" that you could raise some farm or truck product on said farms during each month of the year," is not shown to be a false or fraudulent representation by reason of the further averment "That some farm or truck product could not be grown upon said farms every month in the year," because taking said representation and the negation thereof together it is consistent with the theory that some farm or truck product could be raised on said farms every month of the year while some other and different truck product might not be raised during each month of the year.

(7) The representation "That said farms were surrounded by bearing orange and citrus groves and vegetable-truck farms" is not shown to be false and fraudulent by the further averment "That said farms were not surrounded by bearing orange and citrus-fruit groves and vegetable-truck farms," because said representation and
53 negation taken together is consistent with the hypothesis that said farms were very nearly surrounded on all sides by bearing orange and citrus-fruit groves and vegetable-truck farms, and that the slight portion of the border of said farms which were not contiguous to bearing orange and citrus-fruit groves and vegetable-truck farms was so inconsiderable as to in no way affect the value or productivity of the farms offered for sale.

(8) The representation "That said farms had fine roads running through them" is not shown to be false and fraudulent by the further averment "That said farms did not have fine roads running through them," because the averment and negation taken together is consistent with the theory that said farms had roads running through them which roads were, in the opinion of the pleader, something less than "fine" and because what would constitute a fine road is a matter of opinion upon which minds may reasonably differ and because the indictment nowhere fixes a standard of what would constitute a fine

road or avers any fact showing that the roads in question were short of that standard.

(9) The representation "That said farms were high and dry and well drained, and on the whole like the lands of Kansas, Nebraska, Iowa, and Illinois," is not shown to be false and fraudulent representation by the further averment "That said farms were not well drained, and on the whole like the lands of Kansas, Nebraska, Iowa, and Illnois," because said negation is a negative pregnant and fails to point out in what particular the farms were not well drained and in what particular they were not on the whole like the lands of Kansas, Nebraska, Iowa, and Illinois, and because said averment and negation are mere matters of opinion as to what constitutes a well-drained farm and because said representation and negation taken together is consistent with the hypothesis that said farms were drained and on the whole like the lands of Kansas, Nebraska, Iowa, and Illinois, and were sufficiently drained for all practical purposes for which the lands were offered for sale.

54 (10) The representation "that artesian wells were scattered about on said lands and farms and that they could be obtained by going down 100 feet" is not shown to be false and fraudulent by the further averment, "that artesian wells were not scattered about on said farms" because taking said representation and negation together it is consistent with the hypothesis that certain artesian wells were on said farms and that other artesian wells could be obtained on said farms by going down 100 feet and because the representation and negation together show no material falsity or deception and at most call for a construction of the indefinite term "scattered about."

(11) The representation "that roads were being built around each 160 acre tract and that each of said ten acre farms would face on a road" is not shown to be false or fraudulent by the further averment "that each of said farms did not face on a road" the representation being that roads were being constructed and that when the roads were constructed then each ten-acre term would face on a road.

(12) The representation "that ditches were being dug so that each of said farms would be drained" is not shown to be false or fraudulent by the further averment "that ditches were not dug for the drainage of said farms" because the representation was that ditches were being dug for the drainage of said farms and the negation is that they were not then at that time dug or completed.

(13) The representation "that many miles of fences had been erected and hundreds of homes and many school houses built on said lands" is not shown to be false and fraudulent by the further averment "that many miles of fences had not been erected on and around said farms and hundreds of homes and many school

55 houses had not been built on said farms," because taking the representation and the negation together, so far as fences are concerned, it is consistent with the hypothesis that many miles of

fences had been erected on said lands, although many miles of other fences had not been erected on and around said farms, and further consistent with the theory that many miles of fences had been erected and many other miles of fences had been provided but not yet erected.

And the said representation and negation taken together relating to homes and school houses is consistent with the hypothesis that hundreds of homes and many school houses had been built on said farms while hundreds of other homes and many other school houses had not yet been built on said farms.

(14) The representation "that said school houses were more than comfortably filled with pupils and that more schools would have to be built to take care of the rapid growth of the colonists settling upon said farms" is a representation of matter of opinion and is not shown to be false or fraudulent by the further averment "that what schoool houses there were, were not more than comfortably filled with pupils, and the rapid increase of population had not made it necessary to build more schools" because the representation is one of opinion as to a future event and the negation is that the future event, towit, the future growth of the colony, had not then made it necessary to build more schools.

(15) The representation "that comfortable hotels had been built upon said lands and farms" is not shown to be false or fraudulent by the further averment "that many comfortable hotels had not been built on said lands and farms" because said negation does not deny that comfortable hotels had been built, but denies there are many comfortable hotels, while the representation does not contain the word "many" and the negation in other respects is a negative pregnant which fails to point out in what particular the representation is untrue.

56 (16) The represenation "that improvements of all kinds were going forward at a wonderful rate" is not shown to be false and fraudulent by the further averment that "improvements of all kinds were not going forward at a wonderful rate" because said representation was an indefinite statement of opinion based upon what might be considered wonderful and because the negation did not point out any particular in which it was untrue and because the representation and negation taken together is consistent with the hypothesis that improvements of all kinds were going forward at a rate which the defendants, in good faith, considered wonderful and which the pleader who drew the indictment thought was less than wonderful and because the representation and negation taken together show the representation to be substantially true and free from any quality which would render it a false and fraudulent representation.

(17) The representation "that lumber was so cheap that one could build a beautiful house upon said farms without nearly so great an expense as in most sections of Florida and for about one-half of the expense the same building would cost in the North" is not shown

to be a false and fraudulent representation by the further averment "that lumber was not as cheap that one could build a beautiful home on said farms without nearly so great an expense as in other sections of Florida and at half the expense the same building would cost in the North" because said negation is a negative pregnant and fails to inform the defendant of the particulars or of any particular in which said representation is untrue and because said representation is so obviously a true representation that the same is matter of common knowledge and may be taken judicial notice of.

(18) The representation "that said farms were sold with a positive guarantee that every purchaser, either by himself or his agent, might inspect the farm purchased by him at any time before
57 the actual delivery of his deed and that if, upon such inspection, the lands were not what the purchaser desired it to be, he would, upon demand, receive back every cent he had paid upon the purchase price of said farm, together with six per cent (6%) interest," is not shown to be a false and fraudulent statement by the further averment "that every purchaser of said farms would not be refunded upon demand every dollar paid in, together with six per cent interest, at any time before the actual delivery of the deed, if a purchaser found upon inspection, either by himself of his agent, the land or farm purchased was not what he desired it to be," because such representation and negation when taken together are consistent with the hypothesis that the representation was made in good faith as to every purchaser of a farm with the exception of one purchaser, and that in respect to that one purchaser instead of paying him back his money they gave him something else for his money, which was satisfactory to him and which he preferred to take instead of the money.

The said negation also is a negative pregnant consistent with the hypothesis that defendants would return every cent of the money to every purchaser demanding it except one and as to that one would return him all of the money that he paid in except one cent.

It is also consistent with the hypothesis that the money would be returned to every purchaser together with interest, but in some cases it would not be returned promptly on demand, but shortly after the demand, and the representation and negation taken together show no substantial contemplated injury.

(19) The representation "that said defendants and the said New South Farm & Home Company had made arrangements with the Guarantee Title Company of Jacksonville, Florida, at great expense, to guarantee the title to said farms so that the purchasers of said farms might know that their investments were absolutely safe" is not shown to be false or fraudulent by the further averment "that the New South Farm & Home Company had not, at great expense,
58 made arrangements with the Title Guarantee Company of Jacksonville to guarantee and insure the title to said farms so that purchasers thereof might know that their investments were absolutely safe" because the form of the negation is a negative preg-

nant consistent with the hypothesis that the defendants had done all that they had represented and had done so at a degree of expense which in the opinion of the pleader was something less than great.

(20) The representation "that said farms were cut over and ready to go upon at once and that there were no timber leases on said lands and farms" is not shown to be a false and fradulent statement by the negation "that said farms had not been cut over and were not ready to go upon at once" because taking said representation and said negation together they are consistent with the hypothesis that such of said farms as were offered for sale had been cut over and were ready to go upon at once, that such of said farms as were not offered for sale had not been cut over and were not ready to go upon at once. Said representation and negation taken together is also consistent with the hypothesis that said farms and all of them would be cut over and made ready to go upon at once when sold.

(21) The representation "that there were no timber leases on said lands and farms" is not shown to be false and fraudulent by the negation "that said farms were not free and clear of timber leases" because said representation and negation taken together is consistent with the hypothesis that the part of said land which was then offered for sale and delivery was not free from timber leases and because the question of whether said land was free from timber leases is a question of law which must depend upon certain facts and said indictment sets forth no facts from which the court can infer as a matter of law that the said farms were not free from timber leases.

59 (22) The representation "that said defendants were not land brokers or speculators, that when they offered a tract of land for sale said New South Farm & Home Company owned it outright" is not fradulent statement in itself even if in some particular it was untrue. Said representation is not shown to be false or fradulent by the further averment "that said defendants were land brokers and speculators and did not own said farms out-right" because it is immaterial whether said defendants were land brokers or speculators and because the representation was that the New South Farm & Home Company and not the defendants owned said farms which they offered for sale outright.

Nor is said representation shown to be false and fradulent by the further averment "that said New South Farm & Home Company was not selling the said persons intended to be defrauded something that it owned itself" because it is immaterial who owned the land provided the New South Farm & Home Company intended to convey to the purchaser a good title.

(23) The representation "that the title to said farms were examined and approved by the best attorneys obtainable; that anybody buying a farm from said company could depend upon securing a clear title because the New South Farm & Home Company was selling something that it owned itself" is a representation which is not

denied except insofar as to charge that the New South Farm & Home Company was not selling something that it owned itself, but the said averment must be taken as true as to the examination of the title of the lands and the averment that the title was clear.

(24) The representation "that the farms were free from mosquitoes, malaria, and insects of all kinds, and that said farms were below frost line" is not shown to be false and fraudulent by the further averment in the form of a negative pregnant
60 "that said lands and farms were not free from mosquitoes, and malaria and insects of all kinds and were and are not below the frost line" because the negative to said representation is a negative pregnant and does not point out in what particular the representation was untrue and is consistent with the hypothesis that it was substantially true.

(25) The representation "that the said New South Farm & Home Company had completed arrangements by which a telephone line would be extended direct to Palatka, with local exchanges at Burbank, Fort McCoy, Bay Lake, Orange Springs, and Kenilworth, and that these connections would place each and every of said farms in direct touch with the community at all times" is not shown to be false and fraudulent by the further averment "that the New South Farm & Home Company had not completed arrangements by which a telephone line would be extended direct to Palatka with local exchanges at Burbank, Ft. McCoy, Bay Lake, Orange Springs, and Kenilworth, for the purpose of placing each and every of said farms in direct touch with the community at all times," because said negation is a negative pregnant and no denial of the truth of the representation, and because it does not point out any particular in which said representation is untrue and because such representation and negation taken together is consistent with the hypothesis of the substantial truth of the entire representation.

(26) The representation "that said lands and farms were located high and dry and in a section well drained" is not shown to be false and fraudulent by the further averment "that all of said farms were not located high and dry and in a section well drained" because said representation is consistent with the hypothesis that all of said farms which were intended to be sold were high and dry and
61 in a section well drained and that some of said farms which were not intended to be sold were not in such a section well drained.

(27) The representation "that hundreds of people had already settled upon said farms" is not shown to be false and fraudulent by the further averment "that hundreds of people had not settled upon said farms," because taking the representation and the negation together it is consistent with the hypothesis that hundreds of people had settled upon said farms and hundreds of other people had not yet settled upon said farms.

(28) The representation "that at the little city of Burbank said lands and farms had increased within one year double, treble, and

quadruple the price paid for them by settlers and purchasers, and that the same was true of the lands owned by said New South Farm & Home Company at Silver City" is not shown to be false and fraudulent by the further averment "that said lands and farms at the little city of Burbank and Silver City had not within one year doubled, trebled, and quadrupled the purchase price paid therefor by settlers and purchasers" because said negation is a negative pregnant and no denial of the truth of the representation, and because said representation and negation taken together is consistent with the hypothesis that some of the lands at Burbank and Silver City had doubled, trebled, or quadrupled in value within one year and that some other lands at such places had not doubled, trebled, or quadrupled in value, and further because said representations of value were representations of opinion and were also in the nature of trade talk which the defendants might lawfully make use of in endeavoring as they properly and lawfully might to make the property which they offered for sale appear as desirable as possible.

62 (29) The representation "That thousands of settlers were on said lands and farms and that those who had purchased said lands and farms could sell the same at a very large profit" is not shown to be a false or fraudulent representation by the further averment "That thousands of settlers were not on said lands and farms" because said representation and negation taken together are consistent with the hypothesis that thousands of settlers were in fact on said lands and farms and that there were thousands of other settlers who were not on said lands and farms but who had settled somewhere else, nor is said representation shown to be false or fraudulent by the further averment "That those who had purchased said lands and farms could not sell the same at a large profit" because said latter negation is a matter of opinion of so indefinite a nature that the same should be disregarded.

(30) The representation "That the said lands and farms which the New South Farm & Home Company were selling at thirty ($30) dollars an acre would within two years be worth $200.00 and $300.00 per acre" is not shown to be a false or fraudulent representation by the further averment "That the lands and farms which the New South Farm & Home Company were selling at $30 an acre would not be worth $200 and $300 an acre within two (2) years" because said negation is a negative pregnant and is no denial and because said representation is a matter of opinion as to future events regarding which there could be no certain knowledge and because said negation was merely matter of opinion regarding said future events regarding which there could be no certain knowledge and because said representation was in the nature of seller's talk in regard to the future value of land offered for sale which said seller's talk was not fraudulent but of the nature of a representation which the vendor of land might lawfully make in regard thereto.

(31) The representation "That on said lands and farms
63 were located well-stocked stores and factories" is not shown to be false or fraudulent by the further averment "That there were not well-stocked stores and factories on said lands and farms" because said negation is a negative pregnant which does not put in issue any definite fact and is consistent with the fact that there were stores and factories on said lands and farms and that the stores were stocked to a standard something less than the pleader believed would constitute well stocked and because the negation sets forth no fact from which it may be made to appear whether the stores and factories were well or ill stocked.

(32) The representation "That said farms were the best located and most fertile lands in America" is not shown to be a false and fraudulent representation by the further allegation "That said lands and farms are not the most fertile in America" because taking said representation and negation together it is consistent with the substantial truth of the representation in that it is not denied that said farms were the best located and of a degree of fertility equal to any lands in America.

(33) The representation "That Luther Burbank had arranged with and sold to the New South Farm & Home Company the exclusive right for the production of certain of his farm products" is not shown to be a false or fraudulent representation by the further averment "That Luther Burbank had not arranged with and sold to the New South Farm & Home Company the exclusive right to produce certain of his farm products" because said representation and negation taken together are consistent with the hypothesis that Luther Burbank had arranged with and sold to the New South Farm & Home Company the exclusive right to produce certain of his farm products and also that he had not so arranged and sold to the New South Farm & Home Company the exclusive right to produce certain other and different farm products and because the negation is a negative pregnant and no denial and admits the substantial truth of the representation.

64 (34) The representation "That the New South Farm & Home Company would install a great Burbank producing station on said lands and farms and that Frederick W. Malley, the greatest agriculturist in America, would be the director of said station, and that from said station would be sent the great products of Burbank to all the world" is not shown to be a false and fraudulent representation by the further averment "That the New South Farm & Home Company would not install a great Burbank producing station on said farms and that Frederick W. Malley would not be placed as director of said station," and "That the great products of Burbank would not be sent from said station to all the world," because said negation is a negative pregnant and points out no particulars in which the said representation is untrue and is in law no denial, but an admission, of the truth of said representa-

tion, and is consistent with the substantial truth of said representation.

(35) The representation "That the purchasers of said lands and farms would share in the profits of said station, and that the said Frederick W. Malley would be available for the needs of all purchasers of said farms" is not shown to be false and fraudulent by the further averment "That the purchasers of said farms would not share in the profits of said station," and "That the said Frederick W. Malley would not be available for the needs of the purchasers of said farms," because said negation is a negative pregnant and does not point out any of the particulars in which the said representation is untrue or that the same is in any way material.

(36) The representation "That you could get out of a Pullman car on the said farms," use a long-distance telephone, have the daily paper, rural free delivery, and all the comforts of the home" is not shown to be false and fraudulent by the further averment "That you could not ge out of a Pullman car on the said farms, use a local
65 or long-distance telephone, have rural free delivery and all the comforts of a home," because said negation is a negative pregnant and in law denies nothing but admits the truth of the representation, and because said negation is consistent with the substantial truth of said representation.

(37) The representation "That the purchasers of said farms would receive seeds and plants grown at said Burbank station" is not shown to be a fraudulent representation by the further averment "That the purchasers of said farms would not receive seeds and plants grown at a Burbank station" in the absence of any further averments showing the materiality of said representation or the terms and conditions upon which said persons might receive seeds grown at said Burbank station.

(38) The representation "That said farms when allotted to purchasers would be free from all timber reservations," is not shown to be a false and fraudulent representation by the further averment "That said farms when allotted to settlers and purchasers would not be free from all timber reservations" because said representations and the negation thereof is consistent with the hypothesis that the farms when allotted would be free from all timber reservations in in any way materially affecting the value of the premises in that said farms might be subject only to timber reservations of so slight a character that the maxim *de minimum lex non curat* would apply, and for the further reason that whether or not the farms were subject to timber reservations is a matter of law arising from certain facts, and the said indictment sets forth no facts from which the court could determine the truth or falsity of said representation.

(39) The representation "That one of said ten-acre farms would support any family in luxury and enable it to lay by a comfortable sum each year" is not rendered a false and fraudulent representation by the further averment "That one of these ten-acre farms

would not support any family in luxury and enable it to lay
66 up a comfortable sum each year," because the representation is one of opinion in the nature of seller's talk which it is permissible under the law for a seller to make and upon which a buyer may not rely.

(40) The representation "That one of said ten-acre farms would make a purchaser thereof independent" is not shown to be a false and fraudulent representation by the further averment "That one of said ten-acre farms would not make one independent" because said representation is matter of opinion and not of fact and is in the nature of seller's talk which it is permissible for a seller of land to make and because said representation and negation taken together is consistent with the fact that one of said ten-acre farms would make a certain industrious tenant independent while the same farm or another farm would not make a lazy, shiftless person independent, and the said representation and negation are so indefinite as to the meaning of "independent" as to render said representation of no effect.

(41) The representation "That there was ample rainfall every month in the year upon said farms which rendered irrigation of said farms unnecessary" is not shown to be fraudulent by the further averment "That there was not and is not enough rainfall every month in the year upon said farms to make irrigation unnecessary" because said negation is a negative pregnant and is no denial and is consistent with the substantial truth of the representation and because said representation is in the nature of seller's talk which the law permits and is not fraudulent and because the representation and negation taken together are so uncertain and indefinite that fraud can not be predicated thereon and are consistent with the hypothesis that there was sufficient rain to make irrigation unnecessary every month in the year except one month and that irrigation would be unnecessary during that month because of accumulated moisture in the ground.

67 (42) The representation "That the title to said farms was perfect" is not rendered false or fraudulent by the further averment "That the title to said farms was not perfect" because said representation and negation taken together show no particular in which the said title was imperfect, set forth no facts from which the court can deduce whether said title was or was not perfect and advise the defendant of no facts that will be relied upon to show that the title was not perfect; and further, the said representation and the negation thereof taken together are consistent with the hypothesis that there was an imperfection in the title to some part of the entire tract of land which is described in the indictment by the word "farms" which imperfection did not in any way affect any of the said farms at the time that they would be sold.

(43) The representation "That there was no spot on the North American Continent where nature and man had joined together so

uccessfully for the luxurious abode of humanity as it had upon said ands" is not a false or fraudulent representation because it is a nere representation of opinion in the nature of seller's talk which he law permits a seller to make in regard to land offered for sale nd which the law declares is not fraudulent, nor is said representa- ion rendered fraudulent by a negation in the words of the repre- tation in the nature of a negative pregnant.

(44) The representation "That it was not necessary to fertilize aid farms because the soil was the best in the world" is not rendered a fraudulent representation by further averment to the contrary in the form of a negative pregnant, and because such representation is in the nature of seller's talk, which is permissible under the law nd not fraudulent.

(45) The representation "That there was a national forest reserve lying east of the Burbank-Ocala Colony" is not shown to be a false and fraudulent representation by a direct negation which is a negative pregnant and points out no particular in which the repre-
68 sentation is untrue and because the representation and negation taken together are consistent with the hypothesis that there was a national forest reserve as represented and because the remainder of the representation, to wit, that said national forest reserve compelled all who were seeking lands in and around Marion County to settle on the said Burbank-Ocala Colony was matter of opinion in the nature of permissible and lawful seller's talk.

(46) The representation "That the New South Farm & Home Company was building roads, schools, and homes for the settlers" is not shown to be false and fradulent by the further averment "That the New South Farm & Home Company were not building roads, schools, and homes for the settlers" because said negation is a negative pregnant which fails to point out any particular in which said representation is untrue and is consistent with the substantial truth of said representation.

(47) The representation "That said farms were the center of countless thriving homes" is not shown to be a false and fradulent representation by the further averment "That said farms were not the center of countless thriving homes" because the negation is a negative pregnant consistent with the hypothesis that the said farms were every one within, to wit, ten feet of the center of countless thriving homes and because the said representation was in the nature of permissible and lawful seller's talk.

(48) The representation "That a farm home in Florida with but a few hours work every day would permit any man or woman to prevent the catastrophe of destitute old age" is not shown to be a false and fradulent representation by the further averment "That none of said farms would as a result of a few hours work each day enable or permit any man or woman to prevent the catastrophe of destitute old age" because the negation relates to "said farms" and the representation relates to a farm in Florida generally and not to said

farms, and because said representation if applied to said
69 farms is a representation of opinion and not of fact and in
the nature of seller's talk which the law permits and which is not fradulent, and because the negation is in the nature of a negative pregnant which does not deny but admits the substantial truth of the representation.

(49) The representation "That the pictures in the publications sent out by said defendants represented the true conditions to be seen on said farms," is not shown to be false and fradulent representation by the further averment "That the pictures in said publications did not represent the true conditions to be seen on said farms" because said negation does not in any manner point out or show in what particular the said pictures did not show the true conditions upon said farms, or present any issuable fact upon which defendant might prepare his evidence, and because said representation and negation taken together is consistent with the hypothesis that although conditions shown by the pictures were not true yet that the conditions on the said farms were greatly superior to that shown by the pictures.

(50) The several representations, to wit "That the native inhabitants had made themselves ludicrous by endeavoring to discourage people from settling upon said farms:" "That the native inhabitants in and around said farms were staring with wide-open eyes at the things that the Yankees were doing on said farms," "That there was a great deal of opposition on the part of the native inhabitants of said section for the reason that the best tracts of lands being offered for sale by said New South Farm & Home Company was being fenced and the natural range for the cattle of the native inhabitants being destroyed; that the natives were thereby being forced to roll up their shirt sleeves and go to work" are all and singular immaterial averments, which tend to in no degree to constitute a scheme and artifice to defraud and which should be in each count of this indictment
entirely disregarded, and are in the nature of permissible sell-
69 er's talk whether the same be true or untrue, and said representations and each of them are not rendered false or fraudulent or in any manner made material by a negation of the truth thereof in the nature of a negative pregnant as appears from the averments of the indictment.

None of the aforesaid representations became false and fraudulent representations by reason of any epithet applied to the same or by reason of the adjective false wherever appearing in said indictment or any count thereof, and this defendant says that all of said representations in the manner and form as in said indictment and each count thereof made should be disregarded and said indictment and each count thereof held for naught for want of sufficient averment of facts and circumstances which point directly to the existance of

a scheme to defraud, and that said indictment and each count thereof should be held for naught.

CHARLES H. SEIG, *Defendant.*

H. L. ANDERSON,
WILLIAM A. BOWLES,
W. KNOTT HAYNES,
CHAS. A. POWERS,
Defendant's attorneys.

(Endorsed:) United States vs. Charles H. Seig et al. Demurrer. Filed November 16, 1915. W. L. Devore, clerk.

71 United States District Court, Southern District of Florida.

THE UNITED STATES

vs.

NEW SOUTH FARM & HOME COMPANY, CHARLES H. SEIG, ET AL.

This cause coming on to be heard upon the demurrer to the indictment, and having been argued and submitted,

It is considered that said demurrer be, and the same is hereby, sustained to each count of the indictment.

Done this December 1, 1915.

RHYDON M. CALL, *District Judge.*

(Endorsed:) In the United States District Court for the Southern District of Florida. The United States vs. New South Farm & Home Company, Charles H. Seig, et al. Order sustaining demurrer to indictment. Filed December 1, 1915. W. L. Devore, clerk.

72 United States District Court, Southern District of Florida.

THE UNITED STATES
vs.
NEW SOUTH FARM & HOME COMPANY, CHARLES H. SEIG, et al. } No. 313.

This cause comes on for a hearing upon the demurrer to the indictment. This indictment contains three counts; the first and third counts charge the violation of section 215 of the Criminal Code, misuse of the mails. The second count charges a conspiracy to commit the act charged in the first and third counts. The demurrer challenges the sufficiency of the indictment, and some fifty grounds are assigned. The second and third grounds of said demurrer must be disposed of at the threshold of the case.

The second ground is as follows: "That said indictment does not nor does any count thereof aver and charge any offense against the United States."

Third, "Each and every count thereof is insufficient in that said counts do not, nor do either of them, aver facts constituting a scheme to defraud."

The same scheme to defraud is alleged in the first and third counts, and the conspiracy count also sets out the same scheme. So that if the scheme to defraud set out in each of said counts is not such a scheme as is punishable under the law the entire indictment must fail.

73 The portion of section 215 of the Criminal Code involved is as follows: "Whoever having devised * * * any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises * * * shall for the purpose of executing such scheme or artifice, or attempting so to do, place or cause to be placed any letter * * * circular, advertisement, etc., whether addressed to any person residing within or outside of the United States, in any post office * * * or authorized depositary for mail matter, to be sent or delivered by the post-office establishment of the United States," etc.

It was early settled by the courts that the violation of the act to which this section is an amendment could not be charged in the words of the statute, but that the scheme or artifice to defraud must be sufficiently alleged.

The pleader in this case recognizing this rule has set out the scheme on which the prosecution is based. The representations claimed to be false are therein set out, followed by a "Whereas" setting out each of said representations in the negative. These representations are as to quality of land, climate, crops to be raised, advantages to be obtained, and promises of improvement, etc. There is no denial of the facts of the ownership of the lands, although there is a denial that all the titles were perfect. Nor is there denial that the land was worth fully as much as was to be obtained therefor. For aught that appears in the indictment the lands to be obtained were worth fully as much as was to be paid by the parties purchasing; that the parties engaged in the sale were legitimately engaged in the sale of the lands.

74 The question raised by the two grounds of demurrer above set out is whether one engaged in a legitimate business advertising the article to be sold violates the statute by puffing the qualities of that article. Raising the expectations of the purchaser, but giving that purchaser value received for his money, but not fulfilling those expectations. This question must be answered in the negative.

I have examined the authorities referred to in the briefs of counsel, and some not mentioned in briefs, and while not attempting any discussion of them, the rule to be deduced from them is that the scheme

must be one to defraud the party or by false promises, pretenses, etc., deprive him of money or property without adequate value. Mere puffing or exaggeration of qualities, usefulness, opportunities, or values of an article of commerce, where the purchaser gets the article intended to be purchased and the value of the article is measured by the price paid, do not constitute a false representations, promises, etc., denounced by the statute.

The demurrer to each count of the indictment will therefore be sustained.

RHYDON M. CALL,
District Judge.

(Endorsed:) United States District Court, Southern District of Florida. Opinion of court as to demurrer to indictment. The United States vs. New South Farm & Home Co., Charles H. Seig, et al. Filed December 1, 1915. W. L. Devore, clerk.

75 In the United States District Court for the Southern District of Florida.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* CHARLES H. SEIG, BEN LEVIN, BENJAMIN F. STRAUSS, and FRED W. TURNER, defendants.	Indictment under section 215, Criminal Code.

To the Honorable Rhydon M. Call, judge of said court:

Comes now the United States of America, by H. S. Philips, United States attorney for the Southern District of Florida, and respectfully shows to the court that on the 1st day of December, A. D. 1915, the court made an order in said cause sustaining a demurrer to the indictment in said cause.

And your petitioner feeling herself aggrieved by the said ruling of the court entered therein aforesaid herewith petitions the court for an order allowing petitioner to prosecute a writ of error to the Supreme Court of the United States under the law (act approved March 2nd, 1907, 34 Statutes at Large, page 1246) in such case made and provided.

The premises considered, your petitioner prays that a writ of error be issued in this behalf to the Supreme Court of the United States, sitting at Washington, for the correction of the errors complained of and herewith assigned.

H. S. PHILLIPS,
United States Attorney, for Petitioner in Error.

76 In the United States District Court for the Southern District of Florida.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* CHARLES H. SEIG, BEN LEVIN, BENJAMIN F. Strauss, and Fred W. Turner, defendants.	Violation section 215, Criminal Code.

The foregoing cause coming on to be heard upon petition for writ of error and assignments of error submitted therewith, it is upon consideration thereof ordered that said petition be granted and writ of error allowed.

Done and ordered this 18th day of December, A. D. 1915.

RHYDON M. CALL,
United States District Judge,
Southern District of Florida.

(Endorsed:) In the United States District Court in and for the Southern District of Florida. United States of America vs. Charles H. Seig, Ben Levin, Benjamin F. Strauss, and Fred W. Turner. Order allowing writ of error. Filed December 18, 1915. W. L. Devore, clerk.

77 In the United States District Court for the Southern District of Florida.

UNITED STATES OF AMERICA, PLAINTIFF, *vs.* CHARLES H. SEIG, BEN LEVIN, BENJAMIN F. Strauss, and Fred W. Turner, defendants.	Violation section 215, Criminal Code.

Comes now United States of America, plaintiff in said cause, by H. S. Phillips, United States attorney for the Southern District of Florida, and in connection with plaintiff's petition for a writ of error in this cause assigns the following errors upon which plaintiff in error relies to reverse the judgment of the court herein, as appears of record, to wit:

I.

The court erred in sustaining the demurrer to the indictment in said cause.

II.

The court erred in holding that the scheme to defraud set out in each count of the indictment is not such a scheme as is punishable under section 215 of the Criminal Code.

III.

The court erred in holding that the scheme set out in the indictment shows nothing more than a mere puffing and exaggeration of the quality, usefulness, or value of the land offered for sale by advertisements sent through the mail.

78 Wherefore the United States, as plaintiff in error, prays that the judgment of said court be reversed.

H. S. PHILLIPS,
United States Attorney, for Plaintiff in Error.

(Endorsed:) In the District Court of the United States for the Southern District of Florida. United States of America vs. Charles H. Seig, Ben Levin, Benjamin F. Strauss, and Fred W. Turner. Assignment of error. Filed December 18, 1915. W. L. Devore, clerk.

79 United States of America. Writ of Error.

The President of the United States to the honorable the judge of the District Court of the United States, for the Fifth Circuit, Southern District of Florida, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between the United States of America and the New South Farm & Home Company, Charles H. Seig, Ben Levin, Benjamin F. Strauss, Fred W. Turner, Charles Greve, a manifest error hath happened, to the great damage of the said United States of America as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerned the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, on the eighteenth day of January, A. D. 1916, in the said Supreme Court, to be then and there held, that the record and proceedings, aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 18th day of December, in the year of our Lord, one thousand nine hundred and fifteen.

[SEAL.] W. L. DEVORE,
Clerk U. S. District Court, Sou. District of Florida.

Allowed by Rhydon M. Call, district judge.

(Endorsed:) United States District Court, Southern District of Florida. United States of America vs. New South Farm & Home Co., Chas. H. Seig, Ben Levin, Benj. F. Strauss, & Fred W. Turner. Writ of error filed December 18th, 1915. W. L. Devore, clerk.

80 In the United States District Court for the Southern District of Florida.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHARLES H. SEIG, BEN LEVIN, BENJAMIN F. Strauss, and Fred W. Turner, defendants.

Hon. H. L. ANDERSON, *counsel for defendants in said cause:*

Please take notice that I have on this 18th day of December, A. D. 1915, in accordance with instructions from the Department of Justice, filed a petition and order for writ of error in said cause, together with directions for making transcript and assignment of errors.

H. S. PHILLIPS,
United States Attorney for Plaintiff.

I herewith acknowledge receipt of copy of assignment of errors and directions to the clerk for the preparation of transcript in the above styled cause.

This 22nd day of December, A. D. 1915.

H. L. ANDERSON,
Of Counsel for Defendants in Said Cause.

(Endorsed:) In the District Court of the United States for the Southern District of Florida. United States of America vs. Charles H. Seig, Ben Levin, Benjamin F. Strauss, and Fred W. Turner. Notice to counsel for defendants. Filed December 22, 1915. W. L. Devore, clerk.

81 Endorsed: In the District Court of the United States, in and for the Southern District of Florida. United States of America vs. Charles H. Seig, Ben Levin, Benjamin F. Strauss, and Fred W. Turner. Petition for writ of error. Filed December 18, 1915. W. L. Devore, clerk.

82 In the United States District Court for the Southern District of Florida.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
CHARLES H. SEIG, BEN LEVIN, BENJAMIN F. Strauss, and Fred W. Turner, defendants.

Violation Section 215, Criminal Code.

To W. L. DEVORE, Esq.,
Clerk of said Court.

You are hereby requested to prepare the transcript of record to be filed in the Supreme Court of the United States, pursuant to the writ of error, allowed in the above styled cause, and include in such transcript of record, the following, and no other papers, to wit:

1. The indictment filed in said cause on June 13, 1914.
2. The demurrer to said indictment filed on November 16, 1915.

3. The order and final judgment rendered in said court on December 1, 1915, sustaining the demurrer to the indictment.
4. The opinion of the court, giving his reasons for sustaining said demurrer.
5. The petition for a writ of error.
83 6. The order granting the writ of error.
7. The assignment of error.
8. The writ of error.
9. Citation to defendant in error.
10. These directions.
11. Clerk's certificate.

And you will omit all other papers.

H. S. PHILLIPS,
United States Attorney for Plaintiff in Error.

(Endorsed:) In the District Court of the United States for the Southern District of Florida. United States of America vs. Charles H. Seig, Ben Levin, Benjamin F. Strauss, and Fred W. Turner. Directions to clerk to make up transcript. Filed December 18, 1915. W. L. Devore, clerk.

84 UNITED STATES OF AMERICA,
Southern District of Florida.

I, Edwin R. Williams, Clerk of the United States District Court in and for the Southern District of Florida, do hereby certify that the foregoing pages numbered from one (1) to eighty-three (83), inclusive, constitute a true and correct copy and literal transcript of all papers, records, and proceedings, including the assignment of error and writ of error, in the case of United States of America, plaintiff, versus New South Farm and Home Company, Charles H. Seig, Ben Levin, Benjamin F. Strauss, Fred W. Turner, and Charles Greve, defendants, as same now appear among the files and records of this court, which were prepared according to directions filed by the United States district attorney.

I further certify that I have carefully compared this transcript with the original papers, which are nor on file in this office and a part of the records of this court, of which I am the legal custodian.

In witness whereof, I hereunto set my hand and affix the seal of this court, at Jacksonville, in said district, this 15th day of January, A. D. 1916.

[SEAL.]

EDWIN R. WILLIAMS,
Clerk U. S. District Court.

85 United States of America. Writ of error.

The President of the United States to the honorable judge of the District Court of the United States for the Fifth Circuit, Southern District of Florida, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you between the United States of America and the New South Farm &

Home Company, Charles H. Seig, Ben Levin, Benjamin F. Strauss, Fred W. Turner, Charles Greve, a manifest error hath happened, to the great damage of the said United States of America as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerned the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the eighteenth day of January, A. D. 1916, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Edward D. White, Chief Justice of the United States, this 18th day of December, in the year of our Lord one thousand nine hundred and fifteen.

[SEAL.]

W. L. DEVORE,
Clerk U. S. District Court,
Sou. District of Florida.

Allowed by Rhydon M. Call, district judge.

UNITED STATES OF AMERICA,
Southern District of Florida, ss:

In obedience to the command of the within writ I herewith transmit to the United States Supreme Court the duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same, and have entered on the minutes of this court the within writ, a copy of which is lodged in this office.

In witness whereof, I hereunto prescribe my name and affix the seal of the United States District Court for the Southern District of Florida, at Jacksonville, in said district, this 15th day of January, A. D. 1916.

EDWIN R. WILLIAMS,
Clerk U. S. District Court.

(Indorsed:) United States District Court, Southern District of Florida. United States of America vs. New South Farm & Home Company, Chas. H. Seig, Ben Levin, Benjamin F. Strauss, and Fred W. Turner. Writ of error. Filed Dec. 18, 1915. W. L. Devore, Clerk.

(Indorsement on cover:) File No. 25,091. S. Florida, D. C. U. S. Term No. 808. The United States, plaintiff in error, vs. The New South Farm & Home Company, Charles H. Seig, Ben Levin, et al. Filed Jan. 19th, 1916. File No. 25,091.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
NEW SOUTH FARM & HOME COMPANY ET AL. } No. 808.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

MOTION BY THE UNITED STATES TO ADVANCE.

Comes now the Solicitor General and in accordance with the Criminal Appeals Act, 34 Stat. 1246, moves the court to advance the above-entitled cause for hearing on a day convenient to the court.

Defendants were indicted in the District Court of the United States for the Southern District of Florida, the indictment containing three counts. The first and third counts charged the defendants with using the mails for the purpose of promoting and executing a scheme to defraud, which they had theretofore devised, in violation of section 215 of the Criminal Code. The second count charged the defendants with a conspiracy to commit an offense against the United

States, to wit, to use the mails for the purpose of promoting a scheme to defraud, in violation of section 37 of the Criminal Code.

The scheme to defraud as set out in the respective counts of the indictment comprised representations, etc., made by the defendants in certain literature, etc., deposited in the mails, in relation to certain lands in Florida claimed to be owned by the defendants and which they were endeavoring to sell to the public in small tracts.

A demurrer to the indictment was sustained, the District Court holding in substance that the representations, etc., in the scheme as set out in the respective counts of the indictment were mere puffing and exaggeration as to the quality and value of the lands and not such as are denounced by section 215 of the Criminal Code.

Notice of this motion has been served on opposing counsel.

JOHN W. DAVIS,
Solicitor General.

JANUARY, 1916.

○

No. 308.

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, PLAINTIFF IN ERROR,

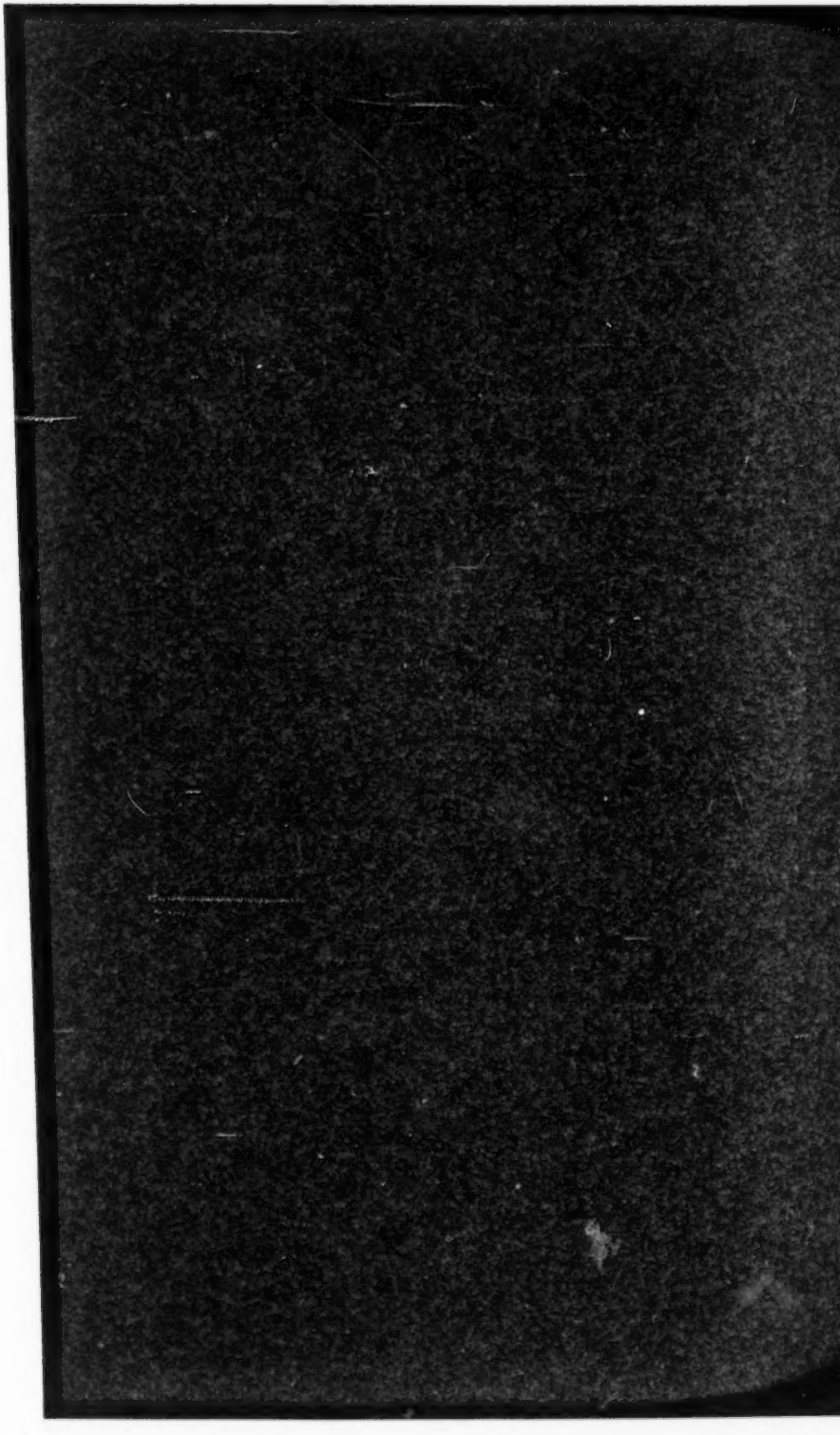
v.

THE NEW SOUTH FARM & HOME COMPANY, CHARLES H. STEVENS, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR THE UNITED STATES.

WASHINGTON: GOVERNMENT PRINTING OFFICE 1916



In the Supreme Court of the United States.

OCTOBER TERM, 1915.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE NEW SOUTH FARM & HOME COMPANY, CHARLES H. SEIG, BEN LEVIN, ET AL. } No. 808.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This writ of error is prosecuted under the Criminal Appeals Act directly to the United States District Court for the Southern District of Florida to review its decision sustaining the second and third grounds of a demurrer to an indictment.

The indictment contains three counts, the first and third charging the deposit of nonmailable matter in violation of sec. 215, Criminal Code, and the second charging a conspiracy to violate that section (R. 1–28). The scheme was to be accomplished by mail

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correspondence with persons who, by fraudulent representations, were to be induced to purchase lands in Florida. The representations to be employed are separately detailed to the number of 46; each of them is specifically averred to have been false and made with intent to deceive and to induce named persons to part with their money in the purchase of these lands (R. 2–7); and most of them were directly calculated to arouse the cupidity of the credulous by creating an expectation of enormous profits and other advantages from the investment.

The court, in its opinion (R. 45–47), found that these representations and their falsity were sufficiently averred. It considered but the second and third grounds of demurrer (R. 29); viz., that the indictment did not aver an offense, or facts constituting a scheme to defraud; and found the indictment insufficient *only* because it did not aver that—the business of land selling being a legitimate one—the lands were worth less than the prices at which they were sold. (R. 46). So that the single question is may section 215, *supra*, be violated though the property to be sold under the scheme is worth the price to be demanded.

ARGUMENT.

Section 215, *supra*, so far as material, reads:

> Whoever, having devised * * * any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing

> such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, * * * circular, * * * or advertisement, * * * in any post office, * * * to be sent or delivered by the post office establishment of the United States, * * * etc.

Section 215, *supra*, is the revised successor of section 5480, R. S. The latter, so far as material, provides:

> If any person having devised * * * any scheme or artifice to defraud, * * * shall, in and for executing such scheme or artifice, or attempting so to do, place any letter * * * etc.

The definition of the scheme in section 215 is broader than in 5480.

Speaking of the latter section, this court in *Durland* v. *United States*, 161 U. S. 306, 313, said:

> But beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. Eagerness to take the chances of large gains lies at the foundation of all lottery schemes, and, even *when* the *matter of chance* is *eliminated, any scheme* or plan *which holds out the prospect of receiving more than is parted with appeals to the cupidity of all.*
>
> * * * * *
>
> It was with the purpose of protecting the public against all such intentional efforts to despoil, and to prevent the post office from

> being used to carry them into effect, that this statute was passed; and it would strip it of value to confine it to such cases as disclose an actual misrepresentation as to some existing fact, and *exclude those* in which is only the allurement of a specious and glittering promise. [Italics ours.]

The Eighth and Second Circuit Courts of Appeal have interpreted section 5480, *supra*, in accordance with the contentions of the Government in this brief. In *Harris* v. *Rosenberger*, 145 Fed. 449, the first-named court, speaking through Judge, now Mr. Justice, Van Devanter, said:

> The Postmaster General, being of opinion that this state of facts constituted satisfactory evidence that the Haydock Distilling Company, as also Becker Bros. & Co., were conducting a scheme or device for obtaining money through the mails by means of false representations within the meaning of the statutes, issued the fraud orders now in question. The appellee, while conceding that this action of the Postmaster General, if within the scope of his authority, is not subject to review by the courts, insists that it was beyond the scope of his authority, because in no possible view of the facts was the case covered by the statutes. Three propositions are advanced in support of this insistence: (1) The representations, although false, were permissible trade exaggerations; (2) the promise to refund the purchase price if the goods were not satisfactory and were returned, and the fulfillment of that promise in the

instances where it was requested, show there was no intention to defraud; and (3) the statutes, rightly interpreted, do not embrace all schemes or devices for obtaining money through the mail by means of false representations, but only those in which it is contemplated that nothing whatever or nothing at all equivalent in value to the money obtained shall be given in return therefor.

Of the first of these propositions it is sufficient to observe that the doctrine in respect to the latitude which is accorded to a merchant in commending or puffing his goods has no application to false representations of material facts which are in their nature calculated to deceive and are made with intent to deceive, and that it was a permissible, if not a necessary, view of the facts disclosed before the Postmaster General, that some of the appellee's representations were of that character. The second proposition is not more tenable. The falsity of the representations and the appellee's knowledge of their falsity being established, as they were, it was not an inadmissible view that the promise to refund the purchase price, if the goods were not satisfactory and were returned, was cleverly devised to give apparent color and support to the representations. * * *

The third proposition proceeds upon the theory that sections 3929 and 4041 * * * although broad and comprehensive, are restricted to schemes which are wanting in all the elements of a legitimate business, or in which it is intended to return nothing whatever or nothing at all equivalent in value for the money or

> property obtained. And applying this theory to the facts disclosed before the Postmaster General, it is contended that, as selling whisky is a legitimate business, and as the appellee was giving an equivalent in value for the money obtained, the case was not within the statutes, although the settled plan upon which the business was being conducted was that of obtaining orders and remittances by means of intentional and gross misrepresentations, calculated to induce purchasers to believe that they were buying something different from that which was actually being sold and worth more than what they were parting with. (pp. 455–6.)

After referring to other cases, the opinion concludes as follows:

> Our conclusion is that when a business, even if otherwise legitimate, is systematically and designedly conducted upon the plan of inducing its patrons, by means of false representations, to part with their money in the belief that they are purchasing something different from, superior to, and worth more than, what is actually being sold, it becomes an objectionable scheme or device within the intendment of sections 3929 and 4041, although what is being sold may approximate in commercial value the price asked and received. The difference between such a scheme or device and those where nothing whatever or nothing at all equivalent in value is intended to be returned for the money obtained is one of degree only, but not of principle. Both are grounded in deceit, oper-

> ate injuriously upon the public, and constitute the obtaining of money by means of false pretenses. A purchaser is entitled to receive what he is induced by the vendor's representations to believe he is ordering and paying for, and not something which he does not order and may not want at any price. (458.)

It is true that the court in the *Harris* case was dealing with sections 3929 and 4041, R. S., the fraud order sections, but it makes the parallel with 5480 and supports its conclusions with cases interpreting the latter section, among them *O'Hara* v. *United States*, 129 Fed. 551 (6th C. C. A.), wherein it is said:

> Schemes to defraud depend for success not on what men can do, but upon what they may be made to believe, and the credulity of mankind remains yet unmeasured. (555.)

The same court (8th C. C. A.) on April 28, 1915, in *Colburn* v. *United States*, 223 Fed. 590, declared that "puffing" property by sellers, if fraudulently done, might constitute a violation of section 215, *supra*. The court said:

> In view of the fact that the charge in the indictments was that the defendants made the representations concerning the land fraudulently and with the intent and purpose of deceiving persons to whom they might come, an instruction telling the jury that the law indulges sellers in "puffing their property" to bring about sales at the highest attainable price, and otherwise as stated in the requested instruction, would have been contradictory to

> the general scheme of the indictments and fatally misleading, without some modification to the effect that the justifiable "puffing" must have been within the limits of honesty and fair dealing. Without such modification the instruction would have justified the jury in finding the defendants not guilty, however fraudulent their representations might have been. The request was properly denied. (596.)

This court, during the present term, has denied a petition for certiorari in this, the *Colburn*, case. 239 U. S. 643.

In *Wilson* v. *United States*, 190 Fed. 427 (2d C. C. A.), the court said:

> The defendants' contention in respect of the fourth question stated is that it does not appear from the indictment or proof that the stock which the defendants sold was worth less than the price paid for it and consequently, that an essential element of the offense charged, i. e., damage, was not established. (433.)
>
> * * * * *
>
> But whatever may be the rule in civil cases, we are satisfied that damage is not made an essential element of the federal statutory offense of using the mails to execute a scheme or artifice to defraud. We are of the opinion that a scheme or artifice is established by proof of false and fraudulent misrepresentations by which a person's right of open and fair dealing is invaded; that having shown that the defendants used false and fraudulent means to induce persons to part with their property

and to purchase stock which was not of the value represented, the government was not required to go further and prove either the existence or extent of damage to the purchasers.

Any other construction of the statute would deprive it of all force in dealing with fraudulent schemes in the guise of legitimate corporate enterprises and would place a premium on lies and deceit. It would only be necessary to deal in a stock of uncertain value, e. g., of a corporation owning patent rights, and all the false and fraudulent statements imaginable could be made with impunity and the mails be used to prey upon the public. Purchasers would not obtain that which they were promised; their money would be obtained by false and fraudulent representations, but in how many cases could the government show that they failed to get their money's worth? How could the real value of such shares be established? (433–434.)

While dealing with sec. 32 of the Criminal Code, the case of *United States* v. *Barnow*, 239 U. S. 74, seems decisively controlling. After pointing out that no financial loss is necessary to a violation of either section 5440 or 5418 R. S.—each of which sections carries definitive language similar to that in sections 215 and 5480, *supra*—this court said (pp. 79–80):

> Like reasoning, we think, must be applied to section 32 of the Criminal Code, whether the United States, or "any person" be the intended victim. If *with intent to defraud*, and by falsely assuming or pretending to be an officer

or employee acting under the authority of the United States the accused shall, in the pretended character, have demanded or obtained any money, paper, document, or other valuable thing, the offense is complete, notwithstanding some valuable consideration was offered or given by the pretended employee for that which he demanded or obtained. It is the aim of the section not merely to protect innocent persons from actual loss through reliance upon false assumptions of Federal authority but to maintain the general good repute and dignity of the service itself. It is inconsistent with this object, as well as with the letter of the statute, to make the question whether one who has parted with his property upon the strength of a fraudulent representation of Federal employment, has received an adequate *quid pro quo* in value, determinative.

CONCLUSION.

The judgment below should be reversed with directions to overrule the demurrer to this indictment.

WILLIAM WALLACE, JR.,
Assistant Attorney General.

MARCH, 1916.

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No. 808

IN THE

Supreme Court of the United States

OCTOBER TERM, 1915.

THE UNITED STATES,
Plaintiff in Error,

vs.

NEW SOUTH FARM & HOME COMPANY ET AL.,
Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

BRIEF AND ARGUMENT FOR DEFENDANTS IN ERROR.

W. KNOX HAYNES,
Attorney for Defendants in Error.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

LIST OF CASES REFERRED TO.

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THE UNITED STATES,

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF FLORIDA.

STATEMENT.

An indictment was returned in the District Court of the Southern District of Florida on the 13th day of June, 1914, for an alleged violation of Section 215 U. S. Penal Code. This indictment contains three counts. (Rec., 1-28.)

The indictments and the several counts are against Charles H. Sieg, Ben Levin, Benjamin F. Straus, Fred W. Turner and Charles Greve, defendants.

The New South Farm & Home Company is not a defendant in said indictment but is referred to therein as a corporation in which the defendants were directors and stockholders.

A demurrer was afterwards filed on behalf of Charles H. Sieg, which demurrer contained eleven separate specifications of causes for demurrer.

The eleventh specifications (Rec., 32 *et seq.*), analyzes some fifty representations charged in the indictment as being the representations intended to be made in the execution of the scheme, and shows the said representations and negations to be so loosely stated, that it is impossible to deduce wherein and in what particular the same are false if at all.

The demurrer to the indictment was argued and submitted and on the 1st day of December, 1915, an order was entered in said District Court sustaining the demurrer to each count of the indictment (Rec., 45), and upon the same 1st day of December, 1915, the Judge of said District Court filed an opinion. (Rec., 45.)

The District Court declared in its opinion that the second and third grounds for demurrer (Rec., 46) must be disposed of at the threshold of the case.

The second ground is as follows: "that said indictment does not nor does any count thereof aver or charge an offense against the United States"; the third is, "each and every count thereof is insufficient in that said counts do not nor do either of them aver facts constituting a scheme to defraud."

The court thereupon in its opinion *construed the indictment* (Rec., 46) and found that the said indictment and each count thereof (as the said indictment and counts were construed by the court) was vulnerable to demurrer for the reasons stated in said second and third specifications of said demurrer and disposed of the same without comment upon the other nine causes for demurrer assigned.

Plaintiff in error has assigned three errors (Rec., 48) but has abandoned all of the specific assignments and based argument upon a ground not assigned.

The theory of the indictment is that defendants devised a scheme to make sale of certain parcels of land, designated in the indictment as ten-acre farms, by what are termed in the indictment to be false pretenses, representations and promises, which representations, etc., are set out and specified in each count of the indictment, although in what substantial particulars the same are false does not appear.

The District Court (Rec., 46) construes the said *supposed* representations, etc., forming the supposed scheme to defraud to be a mere *puffing and exaggeration* of the quality, usefulness, opportunities and value of the land offered for sale, and *not* false pretenses, representations, etc.

And the District Court further finds (Rec., 46) that there is no denial of the fact of the ownership of the land nor any denial that the land was worth fully as much as was to be obtained therefor, and finds that "for aught that appears in the indictment the lands to be obtained were worth fully as much as was to be paid by the parties purchasing, and that the defendants were '*legitimately*' (and therefore not fraudulently) 'engaged in the sale of lands.' "

And the District Court having thus construed the indictment, declares that under the circumstances disclosed by the indictment as construed by the court, one engaged in the legitimate business of advertising an article to be sold does not violate the statute by *puffing* the qualities of that article, and deduces the rule to be that the scheme to defraud denounced by the statute must be one to de-

fraud the party, or by false promises, pretenses, etc., deprive him of money or property without adequate value. Mere puffing or exaggeration of qualities, usefulness, opportunities or values of an article of commerce, where the purchaser gets the article intended to be purchased, and the value of the article is measured by the price paid, "do not constitute false representations, promises, etc., denounced by the statute." And it is conceived that the sole question involved is whether one *engaged legitimately* (and therefore not fraudulently) in the sale of lands of value equal to the price asked violates the statute by merely engaging in puffing or the customary trade talk that usually is an incident to most if not all sales.

And the answer to this arises upon a construction of the indictment and not a construction of the statute.

It is not true as alleged in plaintiff in error's statement (Rec., p. 2) that the Court below found the indictment insufficient solely "because it did not aver that * * * the lands were worth less than they were sold for."

The record shows that the court condemned the indictment as insufficient for the reason that said indictment as construed by the court was consistent with the hypothesis that defendants were *legitimately engaged* in the sale of said lands and that "mere puffing or exaggeration of qualities, usefulness, opportunities or values of an article of commerce where the purchaser gets the article intended to be purchased and the value of the article is measured by the price paid do not constitute false representations, promises, etc., denounced by the statute."

Whether the averment of a given state of facts constitute a false pretense, representation or promise, is to be deduced by applying the rules of law to the construction of the averments and not by any interpretation of the

statute, there being no question as to the scope of the statute involved.

Plaintiff in error has also mistakenly stated the case in the following particulars:

First. On page 2 of plaintiff in error's brief it is stated:

> "The representations to be employed are separately detailed to the number of 46; each of them is specifically averred to have been false and made with intent to deceive."

It is true that at the close of the first count (Rec., 8) and at the close of the second count (Rec., 15-16) the representations referred to have the word *false* applied to them as an *epithet* and it is said that they were so worded, drawn, constructed, etc., and expressed as to deceive, and were intended to deceive any person who might receive them, but *how and in what particulars* the same were false and in what regard they were intended to deceive, whether as to material or immaterial questions does not appear. Nor is it charged that they were made with *intent to defraud.*

The third count contains no such averment of an intent to deceive either generally or specially.

Second. The *statement* of plaintiff in error (Brief, p. 2) that most of the supposed representations "were directly calculated to arouse the cupidity of the credulous by creating an expectation of enormous profits," etc., is hardly supported by the record and is at least open for argument, and so far as this statement differs from the construction placed thereon by the District Court should be disregarded.

Plaintiff in error has further said that on page 2 of its brief:

"The court in its opinion (Rec., 45, 47) found that

these representations and their falsity was sufficiently averred."

This statement is erroneous. It appears (Rec., 46) that the court in its opinion said no more than this:

> "It was early settled by the courts that the violation of the act to which this section is an amendment could not be charged in the words of the statute, but that the scheme or artifice to defraud must be sufficiently alleged.
>
> The pleader in this case recognizing this rule has set out the scheme on which the prosecution is based. The representations claimed to be false are therein set out followed by a 'Whereas.' "

But the Court did not make any finding that the falsity of said representations was "sufficiently averred."

The sufficiency of the averment of falsity of the said supposed representations was directly raised by Assignment XI (Rec., 32 *et seq.*), which assignment remains *undecided* by the District Court, as do several other assignments, particularly Assignment I, which raises the question of whether the several representations and their negations taken together are sufficiently averred to inform the defendants below of the nature and cause of their accusation, that is, to inform them wherein and in what particulars the said representations were false so as to enable them to prepare their defense thereto; which last mentioned assignments of cause for demurrer remain open for the decision of the court below. Although the sufficiency of the pleading must have been considered by the court in determining as it did that for aught appearing in the indictment the parties were *legitimately engaged* in the sale of land.

POINTS AND AUTHORITIES.

I.

It is settled that the right given to the United States to obtain a direct review by this court of the rulings of the lower court on the subjects embraced within the statute of 1907 does not give authority to revise the action of the court below as to the mere *construction of an indictment,* and therefore in the exercise of the court's power to review this record it must accept the construction of the indictment made by the lower court and test its construction of the statute in that respect, starting with the premises that the supposed false representations are in reality merely *permissible puffing* or trade talk and that the indictment is consistent with the hypothesis that defendants were *legitimately* and not fraudulently engaged in the enterprise mentioned in the indictment.

United States v. *Keitel,* 211 U. S., 370, p. 398.
United States v. *Biggs,* 211 U. S., 507.
United States v. *Patten,* 226 U. S., 525, p. 535.
United States v. *Carter,* 231 U. S., 492.
United States v. *Moist,* 231 U. S., 701.
United States v. *Pacific A. R. & N. Co.,* 228 U. S., 87, p. 108.

II.

The third assignment of error (Rec., 49) that the court erred "in holding that the scheme set out in the indictment showed nothing more than a mere puffing and exaggeration of the quality, usefulness or value of the land offered for sale by advertisements sent through the mail" ought not to be considered upon this writ of error be-

cause said assignment is directed to the court's interpretation and construction of the *indictment* and not directed to any construction of the statute, and such construction of the indictment is binding on this court in this proceeding.

The first and second assignments of error also call for a construction of the indictment rather than a construction of the statute.

See authorities under Point I, *supra*.

III.

The supposed scheme to defraud alleged in each of the counts of the indictment as the same is construed and interpreted by the District Court is not a scheme to defraud within the meaning of the statute, because mere puffing or exaggeration of qualities, usefulness, opportunities or values of an article of commerce, where the purchaser gets the article intended to be purchased and the value of the article is measured by the price paid, do not constitute false representations, promises, etc., denounced by the statute, and the ruling of the court below in this respect was a proper statement of the law, particularly in view of the further finding of the court that "for aught that appears in the indictment the lands to be obtained were worth fully as much as was to be paid by the parties purchasing and that the parties" (defendants) "engaged in the sale, were *legitimately*" (and therefore not fraudulently) "engaged in the sale of the lands."

Faulkner v. *United States*, 157 Fed., 841.
Harrison v. *United States*, 200 Fed., 662, p. 665.
Reynolds v. *Palmer*, 21 Fed., 433, p. 435.
United States v. *Staples*, 45 Fed., 195.
Blair v. *Laflin*, 127 Mass., 578.

IV.

A special intent to defraud is a necessary element in an offense under Section 215 United States Penal Code.

No averment of such special intent to defraud is contained in the indictment, and the court below, in construing the indictment, has held that, for aught that appears in the indictment, the defendants were engaged *legitimately* (which precludes fraudulent intent) in the sale of the lands and has thereby construed said indictment as failing to charge such special intent to defraud, and therefore insufficient.

Durland v. *U. S.*, 161 U. S., 306, p. 313.
U. S. v. *Durland*, 65 Fed., 408.
U. S. v. *Stickle*, 15 Fed., 798, p. 803.
Horman v. *U. S.*, 116 Fed., 350.
Rudd v. *U. S.*, 173 Fed., 912.
Hibbard v. *U. S.*, 172 Fed., 66.
U. S. v. *Ried*, 42 Fed., 134, p. 137.
Post v. *U. S.*, 135 Fed., 1, p. 9.
U. S. v. *Wooten*, 29 Fed., 702, p. 704.
U. S. v. *Conrad*, 156 Fed. Rep., 248.
U. S. v. *Hess*, 124 U. S., 485.
A., T. & S. F. Co. v. *U. S.*, 170 Fed. Rep., 250.

When an intent to defraud is a material element in an offense an omission to *aver* such intent as an essential part of the specific scheme described renders the count insufficient, and consistent with the hypothesis of innocent intent.

U. S. v. *Britton*, 107 U. S., 655.
Evans v. *U. S.*, 153 U. S., 584, p. 594.
Fall v. *U. S.*, 8 C. C. A., 209 Fed. Rep., 547, p. 552.
U. S. v. *Post*, 113 Fed. Rep., 852.

V.

The statute neither defines nor denounces but aims only to punish using the mails in effectuating what *without it would still be schemes or artifices to defraud.* If puffing and trade talk is permissible and not fraudulent aside from the statute it does not become so by reason of the statute, nor is the construction of certain averments to be mere puffing a construction of the statute.

Stockton v. *United States,* 205 Fed., 462.

The representation by one who desires the erection of a building that the material can be produced for a certain amount in order to induce another to contract to erect the building for a given price will not sustain an action for deceit.

Emerson v. *Hutchinson,* 63 Ill. App., 203.

Statements that a business can be bought at a bargain, that the place is a good one for business, that money could be made there, are mere expressions of opinion.

Danforth v. *Cushing,* 77 Me., 182.

An action for deceit will not lie for statements as to profits that can be made in the future.

Pedrick v. *Porter,* 5 Allen, 524.

Statements by the vendor of land as to the possibility of acquiring adjoining land and as to the amount of crop that could be grown on the land are mere expressions of opinion.

Mooney v. *Miller,* 102 Mass., 217.

A statement that lots will soon be very valuable and will come into the market soon and be worth $2000.00 each is a mere expression of opinion.

Lockwood v. *Fitts,* 90 Ala., 150.

A representation by a land owner that the land will produce a certain amount of hay and grapes is a mere matter of opinion.

Holton v. *Noble*, 83 Cal., 7.

A statement by a vendor as to the title is a mere statement of opinion.

Atwood v. *Chapman*, 68 Me., 38.

An honest expression of opinion by a vendor of his title, though erroneous, is not fraud.

Fitzhugh v. *Davis*, 46 Ark., 337.

A general assertion of title to property is not such a representation of fact as will be a basis for a charge of fraud.

Ward v. *Luneed*, 25 Ill. App., 160.

An expression of opinion as to the effect of the contents of a deed of conveyance is not such fraud as will defeat a contract.

Hoyt v. *Bradley*, 27 Me., 242.

ARGUMENT.

Plaintiff in error has assigned three alleged errors. (Rec., 48.) These three assignments of error go apparently to the court's construction of the indictment and not to any construction given to the statute.

Plaintiff in error has apparently abandoned all of the assignments of error upon which the writ of error was brought and suggests on page 2 of its brief "that the single question is, may Section 215, *supra*, be violated though the property to be sold under the scheme is worth the price to be demanded?"

With this suggestion defendant in error disagrees, and submits that the abstract question thus suggested does not arise in such limited form upon this record.

It is submitted that the court below in the exercise of its prerogative has construed the several representations and negations as they are pleaded in the counts of the indictment, to be nothing more than a permissible puffing and exaggeration of the quality, usefulness or value of the land offered for sale (Assignment 3, Rec., 49) and that such construction of the indictment may not be here reviewed; and it is further suggested that if any question arises on this record regarding the construction of the statute, in view of the finding of the court below that the representations and negations constituting the supposed scheme amounted to no more than trade puffing and that the indictment is consistent with the hypothesis that the defendants were *legitimately engaged* in the sale of land; the sole question is whether persons engaged legitimately (and not fraudulently) in the sale of land fully worth the price asked for it violate the section

of the statute referred to by *merely puffing* the quality and desirability of the land offered for sale.

It can be conceived that a person engaged in a business otherwise legitimate, may also be engaged in some illegitimate *method* of carrying on such business and that such illegitimate method of carrying on such business might amount to a scheme and artifice to defraud, but it seems impossible that a person could be engaged *legitimately* (that is, engaged in the operation of legitimate methods) in the carrying on of a legitimate business and yet be attempting to execute a scheme to defraud, and it would appear that the District Court having construed the indictment to be consistent with the hypothesis that the defendants were *legitimately engaged* in the sale of land that the same is conclusive in this proceeding and that no question involving a construction of the statute as distinguished from the construction of the indictment remains for the consideration of this court, one cannot be legitimately engaged in a scheme and artifice to defraud.

It is assumed that puffing and trade talk is not of itself fraudulent in the sale of land or any commodity.

That the dividing line between puffing and trade talk which is not fraudulent, and false pretenses and representations of fact which are fraudulent is, theoretically at least, sharply defined and determined by the law, however difficult it may be to apply the definition to a concrete state of facts, the District Court has construed the indictment to involve mere puffing and trade talk and not false pretenses, representations, etc., and as this involves no construction of the statute but a mere application of the rules of criminal law to a criminal pleading, it would seem that that construction of the indictment was binding upon this court and that no construction of the statute remained for the court's consideration.

Puffing and seller's talk which do not amount to representations of material fact are not fraudulent nor are they false pretenses, representations or promises within the meaning of the statute. As said by the Circuit Court of Appeals for the Fifth Circuit, in *Faulkner* v. *U. S.*, 157 Fed., 840:

> "If the advertisement contains some exaggerations that does not constitute a scheme to defraud."

The distinction between the material representations which are fraudulent and those representations which are mere permissible trade puffing or loosely stated exaggerations made in the course of the sale of a legitimate article of commerce for a fair price are very lucidly explained by the Circuit Court of Appeals of the Sixth Circuit in *Harrison* v. *U. S.*, 200 Fed., 662, in which case it is said at page 665 of the opinion:

> "It is by the decisions settled not as an all-inclusive definition but as one sufficient for the purposes of this case that the statutory 'scheme' to defraud may be found in any plan to get the money or property of others by deceiving them as to the *substantial identity* of the thing which they are to receive in exchange and this deception may of course be by implication as well as by express words. On the other hand, the scheme cannot be found in any mere expression of honest opinion as to quality or as to future performance. There must be an underlying intent to defraud * * * as it arises in the present case the question is when does the not uncommon exaggeration of advertising become sufficient evidence of an intent to defraud? Can a business man selling an article of merit and of value at a fair price be convicted of a scheme to defraud because his advertising overstates the capacity and usefulness of the article? If so, where is the line to be drawn? And this brings us to the further question. How far are United States courts and juries to become censors of the advertising of manufacturers or dealers? This question stands out for answer because nearly all business is now aided by ad-

vertisements passing through the mails, and on every hand we see claims of capacity, performance and results which we know cannot stand cross-examination.

On what we think an exhaustive review of all the reported cases arising under this statute we do not find any one which seems on its face to be of the class we have mentioned, exaggerated claims of merits in articles of inherent utility, unless it is *Faulkner* v. *United States*, 157 Fed., 840, in which the Circuit Court of Appeals of the Fifth Circuit reversed the conviction because based merely on exaggerated advertising. The subject is also considered by Judge Severens, then District Judge, who said in *United States* v. *Staples*, 45 Fed., 195, 198:

'Parties who have anything to sell have the habit of puffing their wares and we are all familiar with the fact that it is a very prevalent thing in the course of business to exaggerate the merits of goods people have to sell and within any proper reasonable bounds such a practice is not criminal. It must amount to some *substantial* deception in order to be subject to cognizance by the courts.'"

The rule that puffing in the sale of merchandise or other property is permissible and not criminal is laid down in Wharton's Criminal Law, 8th Ed., Sec. 1154 *et seq.*

The same subject is treated in 14 A. & E. Enc. of L., 2nd Ed., at p. 118.

This court has said in *Southern Development Co.* v. *Silva*, 125 U. S., 247, that statements as to value or what could be done and realized from a mine were not fraudulent and that "such statements are not fraudulent in law but are considered merely as *trade talk* and merely matters of opinion which is allowable."

Like language is used by this court in *Gordon* v. *Butler*, 105 U. S., 553.

There is nothing contained in the statute involved which *defines* or *denounces* any particular form of fraud

but it aims only to punish using the mails in effectuating *what without it* would still be schemes or artifices to defraud. If puffing and trade talk is permissible and not fraudulent aside from the statute it does not become so by reason of the statute (*Stockton* v. *U. S.*, 205 Fed., 462) and whether the facts averred amount to such a scheme and artifice is to be deduced by a construction of such averments.

It is therefore submitted that the court below having construed the indictment and the representations therein as amounting merely to permissible trade puffing that this court must adopt that construction and may not review the same even if it be a mistaken construction. And if mere trade puffing was and is not fraudulent in the absence of this statute it is not fraudulent within the meaning of this statute and therefore the ruling of the court below should be sustained.

It is respectfully submitted that the case of *Harris* v. *Rosenberger*, 145 Fed., 449, relied upon by plaintiff in error supports and does not deny the proposition that a certain latitude is accorded to a merchant in commending or puffing his goods, and *distinguishes* such mere puffing, which is lawful and not fraudulent, from false representations of material fact made with fraudulent intent, the determination of which class the averment may belong arising from the interpretation or construction of the averment itself.

In *Rosenberger* v. *Harris*, a decision of the Postmaster General was upheld in a case in which the respondent was a dealer in whisky, offering whisky for sale and making *material false representations* in regard to the *identity* and *essential characteristics* of the whisky.

The court found that:

"When a busines, if otherwise legitimate, is sys-

tematically and designedly conducted upon the plan of inducing its patrons *by means of false representations* to part with their money in the belief that they are purchasing something different from, superior to, and worth more than what is actually sold, it becomes an objectionable scheme or device within the intendment of Sections 2939 and 4041, although what is being sold may approximate in commercial value the price asked and received."

Applying the test of the rule in *Rosenberger* v. *Harris*, to the present case it cannot be said that it appears under the construction of the indictment given by the District Court that land offered for sale by defendants in error was either different from, superior to, or worth more than what was actually to be sold, and the District Court has found the indictment to contain no material false pretense.

The specific finding of the District Court in the construction of the indictment is that *it does not appear* that the land was not worth the price at which it was sold, and the court further finds in its construction of the indictment that the representations amounted to mere puffing and *did not constitute false representations*, promises, etc., and therefore it could not have appeared that the purchasers were to be induced by means of false representations to believe that they were purchasing something different from, superior to, or worth more than what was actually being sold. In the Rosenberger case a legitimate business was pursued by an illegitimate method; in the present case the defendants are for aught appearing in the indictment pursuing legitimate methods.

We suggest this upon the theory that the court will not look behind the construction of the indictment made by the court below in holding defendants to be *legitimately engaged.*

If, however, our theory in this regard is not tenable and this Court will examine the supposed representations set forth in the indictment, and undertake the construction of the indictment as a pleading, we maintain that there is no representation taken in connection with the words of negation, from which it can be deduced that the land was described in any definite conceivable particular, that the mind can grasp, or understand, to be different from the land sold.

The eleventh assignment of demurrer (Rec., 32) makes a very brief analysis of each of the representations and negations. That analysis is here referred to, to save necessity of repeating it.

The negative statements of the whereas clause in the indictment are in the nature of negatives pregnant. They do not deny anything with certainty and if any of the representations are conceded to be material representations and not mere puffing, nevertheless it is impossible to ascertain what particular form or forms of falsity the defendants are charged with and for aught appearing to the contrary the representations are substantially true, and it also follows that defendants are not informed of the nature and cause of their accusation, as the same is required by the Sixth Amendment to the Constitution, and that for lack of certainty the representations should be disregarded.

If it be contended by plaintiff in error that the lands to be sold were "different from" the lands described, that difference should be made apparent in the indictment, and we respectfully suggest that taking the representations and negations together that it is impossible to deduce any *definite* difference between the land actually to be sold and the description thereof; that it is impossible, if there be a difference, for the mind to make

concrete conception thereof, or for language to describe in recognizable terms what that difference is, and for this reason it is probable that the court below held that "for aught that appears in the indictment the parties engaged in the sale were *legitimately engaged* in the sale of the lands."

The first representation is "That said lands and farms were not swampy."

The negation in the whereas clause is, "Whereas in truth and in fact large portions of said lands and farms were wet and swampy."

It will be remembered (Rec., 1) that the New South Farm & Home Company, which is not made a defendant, is alleged to have been engaged in selling approximately 142,000 acres of land, equivalent to a tract of more than 220 square miles, that *these defendants* (Rec., 2) were engaged in selling "certain lots, plats, tracts and parcels of land called ten-acre farms." There is no averment, direct or inferential, that the particular ten-acre tracts which these defendants intended to sell and deliver, as ten-acre farms, were wet and swampy. The allegation of the indictment that *large parts* of this 220 square mile tract were wet and swampy necessarily implies that *other parts were not swampy,* and in the absence of any direct averment that the defendants intended to sell the wet and swampy parts of the land as land which was high and dry and not swampy, it must be presumed that the defendants intended to sell and deliver only such portions of this large tract as were correctly described, and such parts as were not swampy, and that the representation was true and not false, in substance and in fact.

If the negation had been that *all* of the lands were swampy or that the particular lands that were to be

offered for sale out of this large tract as ten-acre farms were swampy, then the representation that said farms were not swampy might be of different effect.

The remaining averment of representations and negations are briefly analyzed under Assignment XI of the demurrer, at Rec. p. 32 *et seq.*, to which reference is made, and it will be apparent from such analysis that whether the representations are regarded as material representations of fact, or mere puffing, they are not adequately negatived and that, on the contrary, they should be presumed to be TRUE REPRESENTATIONS for want of an adequate and certain averment showing wherein and in what particulars they are claimed to be false.

We also call attention to the representation (Rec., 3) "that comfortable hotels had been built upon said lands and farms" and to the negation thereof (Rec., 5), "that *many* comfortable hotels have not been built on said lands and farms" *as typical.*

This negation does not put in issue the question of whether comfortable hotels had or had not been built on said lands and farms. In fact, it implies that some comfortable hotels had been built but denies simply that there were *many* such hotels. It denies only that which is not asserted as the word *many* does not appear in the representation. (Rec., 3.)

This representation and negation is referred to merely as typical of all of the representations and negations thereof, and in support of the theory that the indictments do not contain any charge of false representation, pretense or promise stated with that degree of certainty, that the nature of the falsity, if any, may be made apparent, and it is submitted that if the falsity of the representations is not apparent from the indictment itself, then such falsity must be presumed not to exist,

and the counts must fail, because, as found by the court below, they do not aver facts constituting a scheme to defraud, for which cause the demurrer was properly sustained and they also support the finding of the court that for aught appearing in the indictment, defendants were *legitimately* engaged.

It is plainly the theory of the indictment that the supposed scheme to defraud was a plan to sell ten-acre farms by representations in regard thereto and the sufficiency of the pleading must be determined by the rules of law relating to schemes to defraud by false representations in sales of property.

It is necessary under the statute "in a count upon a scheme to defraud by means of false representation, to aver clearly and definitely the making of some specific representation and the falsity of such representation."

Milby v. *U. S.*, 109 Fed. Rep., 642.

The further rule is:

> "The averment must state what was pretended, and that what was pretended was false, *and wherein and in what particular it was false.*"
>
> *U. S.* v. *Watkins*, 3 Cranch C. C., 459; 28 Fed. Cas. 16649.
>
> *U. S.* v. *Corbin*, 11 Fed., 238.

Every representation (whether qualified by the *epithet* false or not) alleged in an indictment should be taken to be true in determining the sufficiency of the indictment unless such representation is adequately denied, and is to be taken as true, except in so far as it is adequately denied.

Conjunctive negations are evasive denials and are *admissions* of the averments thus attempted to be negatived.

1 Ency. Pl. & Pr., 797.

1 Bish. New Crim. Proc., Secs. 325, 508.

In *U. S.* v. *Lockwood,* 164 Fed., 772, on demurrer to an indictment for violation of oleomargarine act the indictment charged that defendant did knowingly sell three pounds of oleomargarine which said oleomargarine was not packed

> "in new, suitable wooden or paper packages having marked or branded thereon the name and address of him the said Lockwood, the words 'pound' and 'oleomargarine' and the quantity of oleomargarine so sold as aforesaid."

In sustaining the demurrer to the Lockwood indictment the court says:

> "In the present case the defendant is not informed whether the government intends to show that he used a package not authorized by law, or whether using a package which is authorized by law he failed to write or print on it or to brand it in the manner required by law. For this reason the indictment is too uncertain and indefinite. The demurrer must, therefore, be sustained."

It is said in *U. S.* v. *Watkins,* 3 Cranch. C. C., 459, 28 Fed. Cas., 16649:

> "The averment must state what was pretended, and that what was pretended was false *and wherein and in what particular it was false.*"

And again the court in the same case, on page 460, citing the case of *Rex* v. *Parrott,* 2 Maule & Selwin, 379, quoting the words of Lord Ellenborough, says:

> "Every indictment ought to be so framed as to convey to the party charged a certain knowledge of the crime imputed to him. To state merely the whole of the false pretense, is to state a matter generally combined of some truth as well as falsehood. It hardly ever happens that it is unaccompanied by some truth. Suppose, the offense, instead of being comprised within five or six separate matters of pretense, as here, had branched out into twenty or thirty, of which some might be true, and used only as a vehicle of the falsity; are we to understand from this form

of charge, that it indicates the whole to be false, and that the defendant is to prepare to defend himself against the whole? That would be contrary to the plain sense of the proceeding, which requires that the falsification should be applied to the particular thing to be falsified, and not to the whole. And the convenience also of mankind demands, and in the furtherance of that convenience it is part of the duty of those who administer justice to require, that the charge should be specific, in order to give notice to the party of what he is to come prepared to defend, and to prevent his being distracted amidst the confusion of a multifarious and complicated transaction, parts of which only are meant to be impeached for falsehood.

It has been argued, that perhaps every one of these charges may be false; but the rule, as it has been derived from cases of a mixed nature, where part is true and part false, has introduced a course of separating, by specific averments, all that which is intended to be relied upon as false.

The analogy to the crime of perjury is so strict, and justice also suggests the same, that I think it should be specifically announced to the party by distinct averments, what the precise charge is. It has always been done in indictments for obtaining money by false pretenses; and whenever a more general form of indictment has come under consideration it has not met with countenance; but the court, as in *Rex* v. *Mason*, have reprobated it. If it were good, every man might be brought into court without any possibility of knowing how to defend himself.

Mr. Justice LeBlanc in the same case said: 'The argument is, that alleging that the defendant did falsely pretend,' etc., etc., generally, and in a lump is equivalent to an averment that each of those pretenses was false. But a number of pretenses may consist of some facts which are true, and some false; and it is a necessary rule in framing indictments not only that the offense should be truly described, but that it should be described in such a manner as to give the party indicted notice of the charge. Therefore, when a party is charged with obtaining money under false pretenses, the indictment ought to state

in what particular such pretenses are false. Here it is charged in the first count, that the defendant did falsely pretend 'that he could obtain a protection from the lords of the admiralty, by feeing the clerk, as he had an uncle, a lord, and that it would be no great expense.' Now, that is a pretense, consisting of several facts, part of which may be true and part false. It may be true that he had an uncle, a lord of the admiralty; and if he had, it does not follow that the rest may not be true; therefore, the indictment should have charged what part was false.'

This case shows that, according to the general rule of certainty applicable to indictments, the particular pretenses must be set forth, and it must be averred in what particulars they were false.

We are, therefore, of opinion that this cannot be sustained as an indictment for a fraud or cheat by false pretenses."

In *State* v. *Lambeth*, 80 N. C., 393, p. 395, the indictment charged that Lambeth falsely pretended that a certain horse which he (Lambeth) offered to trade and did trade to one Baker was all right, whereas, in truth and in fact the said horse was not all right. Said indictment was held bad on motion in arrest. In the opinion in the Lambeth case, *supra*, it is said:

"What is meant by all right? Does it refer to color, gait, or docility of disposition, working qualities or soundness? Whatever it does mean, it was incumbent on the state to allege in what respect he was not all right and to make that allegation certain and definite, so that the court can see that an indictable offense has been committed and the defendant may know what he has to defend."

In *Redmond* v. *State*, 35 Ohio St., 81, an indictment for obtaining goods by false pretenses was held to be bad by reason of the literal traverse of the pretenses. The court in that case said:

"The negations are in the nature of negatives pregnant and involved or admit an implication, which, considering the nature and object of the representation destroys or renders their effect immaterial."

In *State* v. *Murphy*, 68 N. J. L., 235, defendant was charged with obtaining money upon the false pretense

> "that the said paper-writing was then and there a good and bona fide check and order for the payment of money of tenor and effect aforesaid, there and theretofore taken by the defendant in good faith from the drawer of said check."

A literal traverse of said representation was held insufficient and the indictment for that reason quashed, the court declaring:

> "The general rule is that the indictment must state the facts of the crime with as much certainty as the nature of the case will reasonably admit, and that an indictment for false pretenses should negative the pretenses by such specific averment as will give the defendant notice of what he has to prepare to defend." *State* v. *Luxton*, 36 Vroom, 605, 48 Atl., 535.

It is suggested in plaintiff in error's brief, page 7, that the Circuit Court of Appeals of the Eighth Circuit on April 28, 1915, in *Colburn* v. *United States*, 223 Fed., 590, declared that puffing property by sellers if fraudulently done *might* constitute a violation of Section 215.

The statement is somewhat anomalous. If "puffing" is to be considered and restricted to the making of such statements as are permissible and not fraudulent then it follows that mere puffing of property in a sale would not constitute an offense under Section 215.

The language of the court in the Colburn case must be considered in relation to the case itself.

In that case it appears that the defendants were engaged in the sale of *worthless land*, representing it, however, to be entirely different from what it was as to its *identity and essential characteristics*, and that the scheme was to attract the credulous, effect sales at a large price and convert the money to defendant's own use *without*

giving any substantial consideration therefor. In that case, at page 595 of the opinion, it appears that counsel for defendant submitted a request for an instruction to the jury.

This instruction is apparently a correct statement of the law regarding the privilege of a seller to puff property offered for sale, that is, it is correct as an abstract proposition, but it would seem that the court held that the giving of this instruction as an abstract proposition might have been fatally misleading under the circumstances without such a modification as would inform the jury that "justifiable puffing must have been within the limits of honesty and fair dealing." In other words, it is the apparent view of the court in the Colburn case that although the instruction was correct in the abstract it would nevertheless be misleading unless a fair *definition* of puffing was given to the jury accompanying such instruction. Otherwise, the jury might confound permissible puffing with real actual fraudulent misrepresentations.

We submit there is no analogy between anything said in the Colburn case and the present case, especially in view of the fact that the court below in this case has, in its construction of the indictment, found that the puffing indulged in by the defendants was not fraudulent in its nature.

The Colburn case was an out and out swindle, a confidence game, an endeavor to obtain by false pretenses substantial sums of money for something that was known to be worthless;—differing entirely from the present indictment, which the court construes as consistent with the hypothesis that the full value was to be given to every purchaser and that the defendants below were *legitimately engaged* in the sale of land.

We see no analogy between the case of *Wilson* v. *United States,* 190 Fed., 427, referred to upon page 8 of plaintiff in error's brief, and the questions presented by the present record. In the quotation from the Wilson case appearing in plaintiff in error's brief are certain segregated sentences taken from the opinion. It is said:

> "Whatever may be the rule in civil cases we are satisfied that damage is not made an essential element of the Federal statutory offense of using the mails to execute a scheme or artifice to defraud."

To this we agree, but believe there must be an *intent* to injure and an attempt by the use of the mail to effect that intent. We cannot believe that Congress intended to create a felony out of the use of the mail in carrying on any scheme or transaction which would not, if effected as planned, result in damage or injury to some one. Perhaps proof of the definite extent of the damage would not be required and indeed it is apparent from reading the remainder of the opinion that, that is all that the court meant by the language used. Indeed the court says:

> "That having shown that the defendants used false and fraudulent means to induce persons to part with their money and to purchase stock *which was not worth the value represented* the government was not required to go further and prove either the existence or extent of damage to the purchasers."

The reference to the case of *United States* v. *Barnow,* 239 U. S., 74, seems to have no analogy to the case presented by this record.

In the Barnow case the gist of the offense was falsely impersonating an officer or employe of the United States, and in one set of counts taking upon himself to act as such with intent to defraud, and in the other set of counts demanding or obtaining from any other person any money or other valuable thing, with intent to defraud.

The holding of this court in that case appears to be that the impersonation need not be of a real existing officer or employe and that under the counts arising under the second branch of Section 32 of the Penal Code it is only necessary that the offender demand or obtain in such pretended character money or other valuable thing *with intent to defraud*, and that it is unnecessary to prove a consummated fraud or injury to the person from whom the money or property is obtained; or, putting the question more tersely, the three elements of the offense mentioned in certain counts are (1) with intent to defraud impersonating an officer or employe of the United States, (2) in such pretended capacity obtaining money or other valuable thing, and that *a consummated fraud* is not a necessary element of the offense.

If the reference to the Barnow case is to show that under Sec. 215 Penal Code a consummated fraud is not a necessary element of an offense and an *intent to defraud*, together with the use of the postal establishment in attempting to execute such intent are elements of the offense the proposition is agreed to.

In Conclusion.

It is respectfully suggested that the rulings of the court below in sustaining the demurrer to each count of the indictment involved only a consideration of the sufficiency of the indictment under the rules of criminal law and did not involve the construction of the statute.

The elements of an offense under Section 215 U. S. Penal Code are two: First, the devising of a scheme or artifice to defraud, or the devising of a scheme or artifice to obtain money by false and fraudulent pretenses, representations or promises; and, second, the use of the post

office establishment of the United States in and for executing such scheme or attempt so to do.

The statute neither defines nor denounces any particular form of fraud and aims to punish only that which in the absence of the statute would be a scheme or artifice to defraud (*Stockton* v. *U. S.*, 205 Fed., 462). The determination of whether a given state of facts constitute or aver a scheme to defraud is a question of law to be determined upon the construction of the averments of the indictment and not upon a construction of the statute itself.

We submit, therefore, that the rulings of the court below did not involve the construction of the statute and ought not to be here reviewed, but if this position is not tenable we submit that upon any view of the case that the ruling was a correct ruling and should be here sustained and the writ of error dismissed.

If, however, the court here find the rulings of the court below to involve the construction of the statute, and to be erroneous in that regard the cause should be reversed only so far as such rulings are held to involve the construction of the statute and the cause remanded to the court below to decide the remaining causes assigned for demurrer involving the sufficiency of the indictment as a criminal pleading.

All of which is respectfully submitted.

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